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PROCEEDINGS MISSISSIPPI STATE BAR

SIXTY-SIXTH ANNUAL MEETING

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VOLUME XLII **FALL 1971** **NUMBER 4**

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MISSISSIPPI STATE BAR

1971-72

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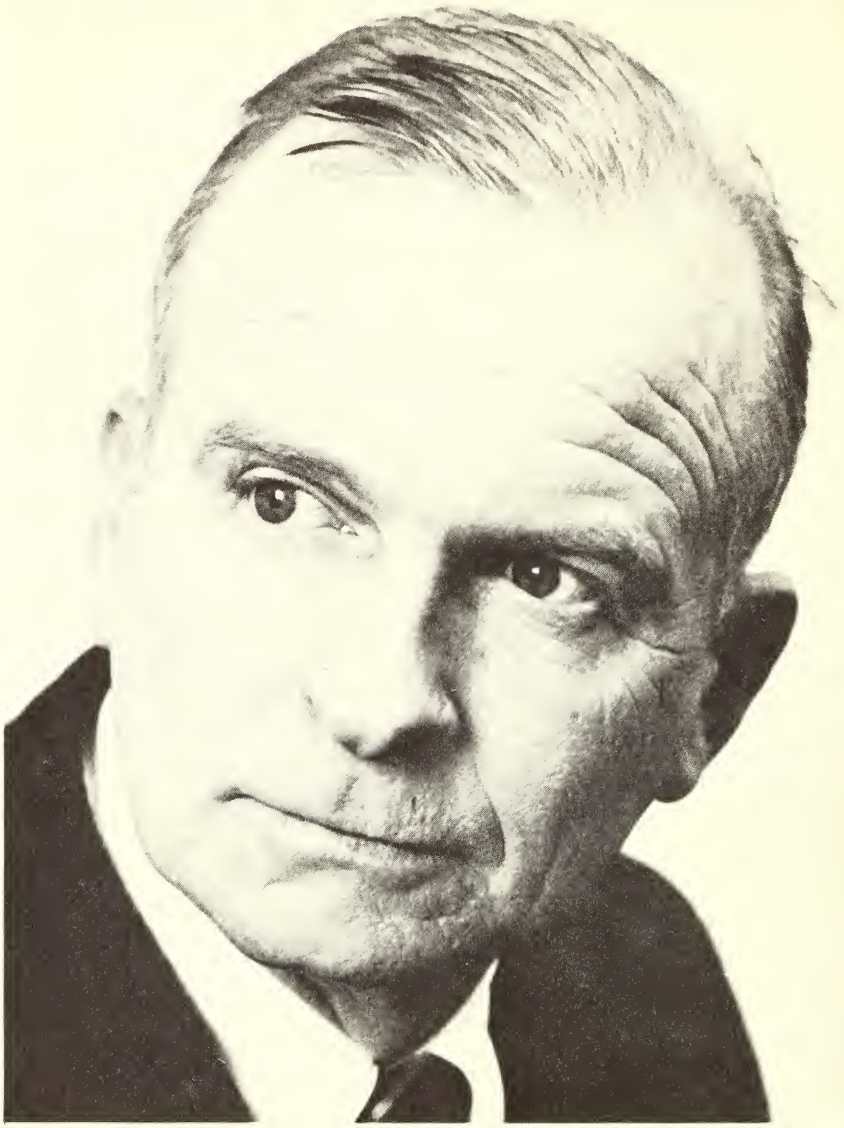


JOEL W. BUNKLEY, JR.

DEAN OF THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW
1969 - 1971

MEMORIAL

I first met Bill Bunkley on registration day in September, 1952. As a reasonably innocent freshman law student, I was somewhat confused by the registration procedure and completely awed by the imposing dignity of Lamar Hall. Mrs. Grace Brown—bless her heart!—had kindly guided me through the perplexing process of choosing schedules and filling out class cards and related forms. When I had completed the last card, she directed me to Bill's office and told me to "get Mr. Bunkley's approval" of my schedule.

With some trepidation I knocked on his door and was greeted with a gruff "come in." My initial impression of Bill was that I had met a man who was highly intelligent, conscientious and thoroughly dedicated to the task in which he was involved. He questioned me carefully about my choice of courses and evidenced a sincere interest in helping me adjust to the law school regimen. When he learned that my last name was Williams, he relaxed his professional demeanor and wanted to know if we were related (his grandfather was Senator John Sharp Williams). Although we were unable to establish kinship, we nevertheless discovered a number of compatible interests and I thoroughly enjoyed the conversation. When I left his office, I went with the conviction that Bill Bunkley was a scholar, a gentleman, and a good friend. I have never changed that initial impression—although I confess it was severely tested during the first class session in Civil Procedure!

Recognizing me from our conversation of the preceding day, Bill called on me to give the first case. I stumbled awkwardly through the unfamiliar jargon and concluded by incorrectly identifying the principal issue in the case. There was a moment of silence and then the trenchant inquiry which would become all too familiar to the Civil Procedure class: "Now, just where did you get that?" My embarrassed efforts to explain where I had "got" that interpretation of the case only added to my confusion and to the merriment of the class. I finally had the good sense to shut up and Bill took over. Using my misinterpretation of the case as the starting point, he delivered a brilliant, concise

exposition on the point of law involved and then carefully outlined the technique for briefing cases and for stating them in class. When he concluded, each person in that room sensed that he had been introduced to the study of law by a master teacher.

In my subsequent years as a law student, my respect for Bill's competence as a teacher continued to increase. He was always thoroughly prepared for each class session and his keen, incisive mind and probing questioning demonstrated the Socratic method at its finest. I quickly found out, however, that the image of a serious scholar was not the only facet of Bill's personality. At the end of the first semester the legal fraternities staged rush parties to which both rushees and law faculty were invited. Bill Bunkley, John Fox, Hector Currie and Bob Farley were among the first to arrive at each party and quickly established a proprietary interest over that parcel of real estate situated adjacent to the beer keg. From this vantage point they proceeded to demonstrate to the neophyte law students the proper techniques for conversation, ale quaffing, and singing. The latter, which became louder and less harmonious as the evening progressed, nevertheless served to create a warm bond of camaraderie among faculty and students. I recall such occasions as being thoroughly enjoyable respites from the daily grind of law studies.

As my friendship with Bill developed during succeeding years, I gained a deep respect for his love for the law school, for Mississippi, and for his chosen profession. Bill's humanistic philosophy and broad perspectives were rooted in the strong traditions of his family and nurtured by the diverse experiences of his life. He was born in Washington, D. C., on November 12, 1916. His father, Admiral J. W. Bunkley, Sr., was a career naval offiicer who served with distinction in two world wars. His mother, Sally Williams Bunkley, was the daughter of United States Senator John Sharp Williams. As a child, Bill lived in an exciting variety of places, both within the United States and abroad, and developed an abiding appreciation for the diverse cultures and problems of this world. Although possessing a world view, Bill always considered Yazoo County, Mississippi, as his home.

Upon graduation from high school, he won an appointment to the United States Naval Academy, where he achieved an outstanding record during his plebe year. Eyesight difficulties forced him to withdraw from Annapolis after the first year, and he then entered the College of William and Mary. He loved the old college and the colonial traditions of Williamsburg. His experiences there flavored his life and he often recalled the friendships and the escapades of his college days.

He received the A.B. degree from William and Mary in 1938 and, having decided upon a career in law, enrolled in the George Washington University Law School. As war clouds rolled over Europe Bill became convinced that the United States would soon be engaged in that conflict. He withdrew from law school and volunteered for naval officers training in 1940. Bill was commissioned an Ensign and served in the Navy with distinction, achieving the rank of Lieutenant Commander.

In 1942 Bill made the most important decision of his life: he asked Rubye Barnes to marry him! Rubye, an attractive, petite brunette, accepted his proposal and proved a charming complement to Bill's professional life. Throughout their marriage she provided a continuing source of encouragement and an inexhaustible wellspring of charm and goodwill. Much of Bill's success as a teacher and a Dean derived from the support and encouragement of this beautiful lady.

Following his separation from the Navy in 1945, Bill was determined to complete his legal education. He immediately enrolled in the Ole Miss Law School where he distinguished himself as an able scholar. He became a member of Phi Delta Phi legal fraternity and served as Associate Editor of the Mississippi Law Journal. When he graduated in 1946, he was selected as the outstanding graduate in his class.

A few months later, Bob Farley asked Bill to return to the law school as a member of the faculty. The remaining years of his life were devoted to the teaching of law and to scholarly research and writing. In 1950, Bill was awarded a Sterling Fellowship at the Yale University Law School and performed advanced graduate work in law at that institution during the 1950-1951 academic year.

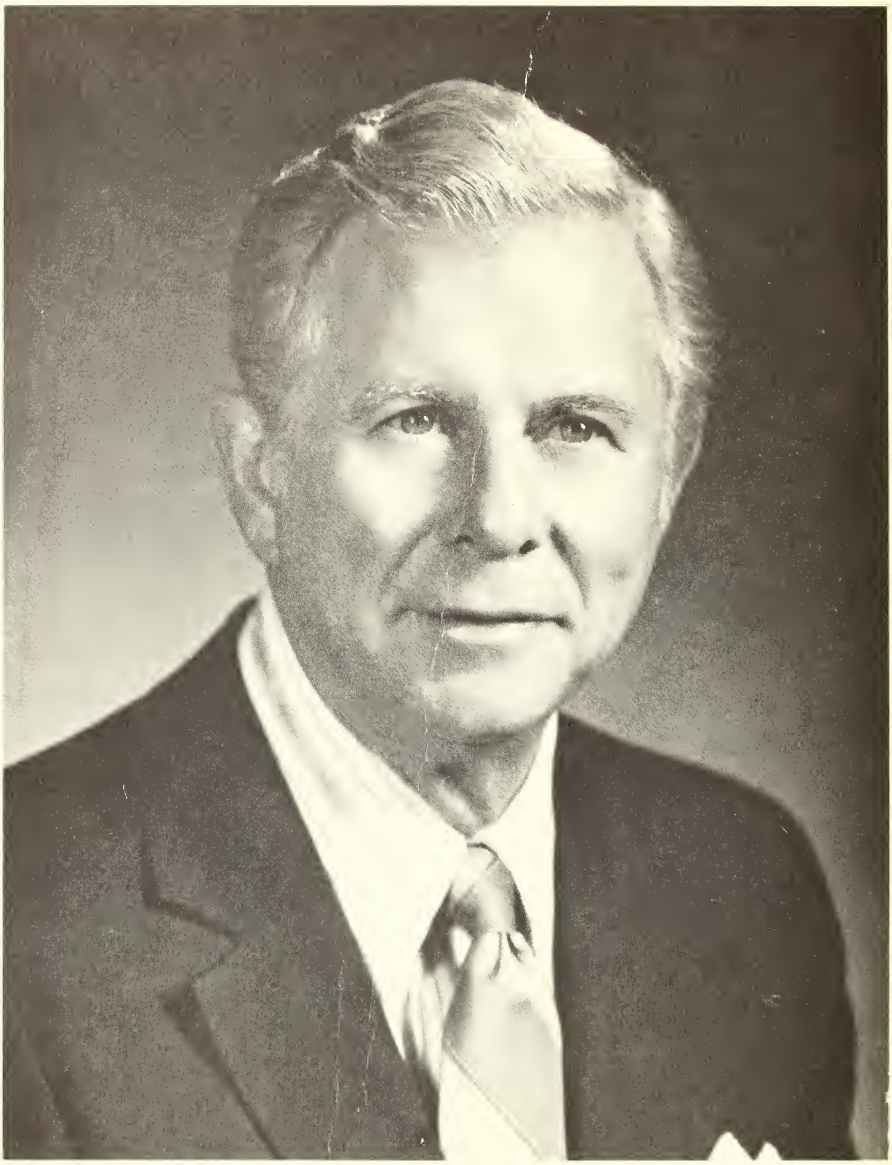
Bill's major areas of academic interest were Civil Procedure, Federal Jurisdiction, Restitution, and Domestic Relations. It was in the field of Domestic Relations that he obtained his greatest prominence. His book, *Divorce and Separation in Mississippi*, was published in 1957 and quickly became the principal authority in that field.

Bill Bunkley was an outstanding teacher. His probing questions, his verbal thrusts and parries, his demands for a rational basis for each position taken, made him an awesome figure in the classroom. Yet his sense of humor, the twinkle in his eye, and his fairness won over even the most battered of students. Bill possessed true academic stature and, like any great law teacher, demonstrated strong self-confidence and authority. His willingness to defend his position, whatever it might be, often brought him into conflict with John Fox—who was always ready to debate the other side of any issue! Only Bill among the faculty had the temerity to challenge the Great White Father and their verbal skirmishes, beginning in 1946 and continuing until John's death in September, 1965, were a source of delight—and education—for several generations of law students.

Bill was an extremely able administrator. He succeeded John Fox as Director of Law Admissions in 1963 and was appointed Assistant Dean of the School of Law in 1965. On July 1, 1969, he was appointed Dean of the School of Law and immediately launched upon the most active and perhaps most trying period of his life. The Law School was then involved in accreditation difficulties with the Association of American Law Schools and Bill devoted an intense effort to achieving those changes which were necessary in order to maintain our accreditation. That he was ultimately successful is due in large measure to the sacrifices of his time and energy which he so willingly made. The twenty-seven brief months of his deanship, although troubled by many pressures and stresses, produced significant growth in student enrollment and important new programs in clinical legal training. At his death on September 30, 1971, the Law School stood on the threshold of major progress and growth. In a large measure, these achievements and nascent potential are the products of the untiring efforts and sincere devotion

to duty of one man: Dean Joel William Bunkley, Jr. The School of Law, the University, and the Bar have lost an able colleague and a good friend with his death. His spirit and the traditions which he loved will continue to strengthen and guide the School of Law in its steady progress toward the goals which he envisioned.

Dean Parham H. Williams, Jr.



WILLIAM A. BACON

RETIRING PRESIDENT OF THE MISSISSIPPI STATE BAR

PROCEEDINGS OF THE SIXTY-SIXTH ANNUAL MEETING OF THE

Mississippi State Bar

Held at Biloxi, Mississippi, on June 10, 11 and 12, 1971

The First General Session of the Mississippi State Bar was called to order at the Broadwater Beach Hotel, Biloxi, Mississippi, on June 10, 1971, by Hon. William A. Bacon, President of the Mississippi State Bar.

Hon. C. Randall Jones, President of the Harrison County Bar Association, delivered the welcoming address and introduced Hon. William A. Bacon, President of the Mississippi State Bar, who gave the following address:

PRESIDENT'S REPORT*

William A. Bacon

Ladies and Gentlemen of the Mississippi State Bar Association, it is time and my privilege to make to you the annual report of the President and the Bar Commissioners for the Annual Bar Convention. The By-Laws of our association provide that the President of the Association shall report annually to the members of the Bar at its annual convention. It is also provided that the report of the Board of Bar Commissioners may be included in that report. I am happy to make this report to the association on behalf of myself and the Bar Commissioners, and to give you a report of our stewardship.

I took office as President at the conclusion of the annual meeting here in Biloxi on June 27, 1970. This has been a most pleasant, but also an extremely busy year. The Board of Bar Commissioners have been convened in session for a total of seven times and their cooperation has been outstanding. The post of Bar Commissioner in our association is a sacred and important one, and no person should be proposed or elected as Bar Commissioner unless they are dedicated to the work of this association and will attend the meetings. I'd like to report to you what has taken place in your Bar Association during this past year.

* This address has been abridged by the editor.

During the past year five seminars have been held by various committees of the State Bar Association. The committee on Economics of Law Practice, under the very able leadership of Phineas Stevens, sponsored a seminar on Law Office Management under the theme of "Practicing Law Profitably." We had an enrollment of three hundred and thirty-five lawyers and secretaries in attendance in a two day session in Jackson, which was the largest attendance of any seminar ever sponsored by our Association. On Saturday morning at nine o'clock A.M., when the seminar commenced its second day, every seat was taken. Our State Bar is most deeply indebted to Mr. Cullen Smith of Waco, Texas, an outstanding authority on Law Office Management, who conducted the seminar and provided all of his services without charge to this Association.

Next, we had an oil and gas seminar in April of this year which was attended by two hundred and twenty-five people. That two day event was co-sponsored by the Mississippi Petroleum Landmen's Association, the Mississippi Oil and Gas Lawyer's Association, and the Bar Association Oil and Gas Committee. Many favorable reports have come to us as a result of that meeting. Tom Crews, Chairman of our committee, deserves our special thanks.

In May of this year, the Criminal Law Committee, under the leadership of C. C. "Cliff" Finch, conducted a two day seminar with outstanding speakers and had an attendance in excess of one hundred lawyers.

Then, preceding the opening of this State Bar Convention, the Admiralty and Maritime Actions Committee, under the leadership of Judge Ed Wilson, held an Admiralty Seminar. The Military Law and Legal Assistance for Servicemen Committee also held a seminar under the able direction of E. W. Montgomery, II, of Jackson. During the past year, I estimate that more than one-fourth of the lawyers of this Association have participated in one way or another in the work of continuing legal education, which is quite a tribute to our Bar.

The Commercial Code Committee conducted a survey among the Chancery Clerks of this State to determine how each handled the filing of the forms of the Unified Code Committee. From that survey, the committee was able to determine any problems in the handling of those filings and to suggest changes.

During the past year the Complaints Committee has rendered fine service on difficult matters. The Complaints Committee dealt with twenty-two formal complaints, of which eight were settled and dismissed as being without merit. Fourteen of those complaints still

remain pending. One disbarment for a felony conviction was recorded during the year, and one disbarred attorney was re-instated by court decree. One of the great difficulties reported by the Complaints Committee is that of obtaining the services of attorneys to conduct investigative hearings. Our complaints procedure is cumbersome and possibly needs revision.

One of the great achievements of this administration, in addition to the seminar on Law Office Management, has been the completion of the report on the Economics Survey made by this Bar Association. Sherman Muths was Chairman of that committee, ably assisted by Lester F. Sumners, past chairman and now President-Elect of this Bar. That project was commenced during the administration of Honorable Boyce Holleman, who preceded me as State Bar President. Like so many other uninformed lawyers, I thought that when the survey forms were returned that would be all that we would need. I soon found out, however, that that was only the beginning. All of the information had to be fed into computers to determine percentages and trends shown by the surveys. The computer center at the University of Mississippi provided the computers and did all of the necessary work in providing data, statistics and information from our surveys. We are most grateful to them. Thereafter, arrangements were made with the Mississippi Research and Development Center to do the statistical analysis of the survey. Dr. W. Byron Long and his fine staff at the R & D Center provided the outstanding analysis, narrative and the comment on that survey. We are deeply grateful to Dr. Long and to his staff. The cost of printing and publishing the survey was in excess of five thousand dollars, and your State Bar Association simply did not have the funds with which to publish it. Without the generous support of the Mississippi Valley Title Insurance Company and its fellow members of our association, O. B. Taylor, Jr., and Rowan Taylor, President and Vice-President of that fine organization, our survey would never have been printed. Without cost to us, the Mississippi Valley Title Insurance Company has printed and published that survey. When you registered at this convention, you were given advance copies of that Economic Survey, and if you don't have them we have some copies over here. On tomorrow morning, President-Elect Lester F. Sumners and Sherman Muths, Chairman of that committee, assisted by Dr. Long, will discuss that report. That is the program that you will not want to miss. Copies to the other members of this State Bar Association who are not in attendance at this convention will be mailed to them, not later than June 21st of this year.

The Ethics Committee was given the American Bar Association

Code of Professional Responsibility, for study. After much study, the committee recommended to the Board of Bar Commissioners that the Code be adopted with certain minor amendments. In accordance with law, those recommendations were adopted by the Board of Bar Commissioners and a petition was presented to the Mississippi Supreme Court asking that such rules and regulations be promulgated for the bench and bar of Mississippi. On March 15, 1971, the Mississippi Supreme Court approved and promulgated the rules of professional conduct for lawyers. A copy of that Code has been mailed to each lawyer in this Association. I commend those rules and the observance of them to all of the members of our State Bar. This Association is deeply grateful for the work of the Ethics Committee Chairman, Presiding Justice Robert G. Gillespie of our Mississippi Supreme Court, and to the members of his committee.

During this past year it has become necessary to accept a raise in premiums on the group hospital-surgical insurance which has been in force for this association or to have the policies cancelled. The claims have been exceeding the premiums. Under the able leadership of Chairman Guy Mitchell, Jr., of Tupelo, the committee also studied additional group coverage programs. Yesterday, at the final meeting of the Bar Commissioners, the committee's proposals were submittted to the Bar Commissioners. The Commissioners voted for a new and expanded program to be serviced by Thomas Yates & Company.

The Judicial Administration Committee, under the able leadership of Judge Arthur B. Clark, Jr., worked with the Circuit Judges Conference in an advisory capacity on the development of new rules for the operation of the circuit courts. Also, the committee has been accumulating data on how various courts plan to handle the appointment of legal counsel under the new law which extends such appointments to many misdemeanor cases. Also, we are especially proud of the work of the Law Day—USA Committee. For the past two years the Mississippi State Bar Association has received national awards for its program on Law Day—USA. I hope that our good fortune will be continued into this year. It should be. John T. Armstrong's committee arranged for 105 highway billboards to be used throughout the state proclaiming Law Day. That service was provided by the Outdoor Advertising Association of Mississippi at no charge to the State Bar. We are most appreciative of that fine contribution. The committee also set up district committees to arrange speaking programs in high school assemblies. A total of one hundred and forty-six attorneys delivered law day speeches under that project. Speeches were made to clubs and organizations all over the State. In addition thereto, the

Governor of the State of Mississippi and Mayors throughout the State proclaimed May 1st as "Law Day—USA," and called upon its citizens to observe the rule of law.

The Law Journal staff at the University of Mississippi is working on the compilation of a forty year cumulative index. The funds for the project have not yet been secured, but the work is continuing. Also, several meetings were held at the University of Mississippi School of Law by the Law School Liaison Committee on the development of an internship program for senior law students. Judge N. S. Sweat of Corinth resigned as Circuit Judge and went to the Ole Miss School of Law to be in charge of that program. During the past year the program has been operated in the offices of several prosecuting attorneys throughout this State. During the coming year it is hoped that the program can and will be expanded to cover the general practice area where senior law students will serve as interns in offices of private practitioners. That is one of the finest programs which could equip a young lawyer to enter the practice of law.

The Study Committee, under the very able leadership of O. B. Triplett of Forest, studied and recommended a number of bills for passage to the Mississippi Legislature. The Legislative Committee was directed by Chairman W. B. Alexander in the Senate and H. L. Meredith in the House of Representatives. A total of eighteen bills sponsored by the Bar Association were introduced in the Legislature. Passage was obtained for a number of those bills, including: (1) increasing compensation for appointive counsel; (2) increasing juror and witness fees; (3) permitting service of notice on opposing counsel by mail and (4) some matters relating to guardianships of indigents, and other matters. In addition thereto, the Study Committee took under advisement several new proposals. Final recommendations have not been completed by the sub-committees studying those bills.

Under the able leadership of Charles S. Tindall of Greenville, the Memorial Committee conducted a most impressive Memorial Service for thirty-two members of the Mississippi State Bar who died during the past year. That service is always conducted on the opening day of the Supreme Court in September. Mr. Tindall and his committee prepared and held a most dignified and impressive ceremony in tribute to our departed brethren.

At the conclusion of the convention last year, a committee was appointed by your president to consider a change in the method of election of the Second Vice-President and President-Elect of this association. That committee, under the very able leadership of Tom Tubb

of West Point and Vice-Chairman Erskine W. Wells of Jackson, has done much work and research on that question. You have heretofore received a recommended change in the Bylaws of this Association regarding the election of the First and Second Vice-Presidents, so that all of the members of this Bar Association will have an opportunity to vote on its officers. That recommended change will be presented this morning.

The Taxation Committee, under the able leadership of Charles A. Carter of Jackson, has been working at the University of Mississippi, with the idea in mind of staging an annual tax institute. It is hoped that final plans for such institute may be completed late this summer.

The Workmen's Compensation Committee has done a tremendous amount of work during the past year. Under the able leadership of Shelby Rogers of Hattiesburg, the committee has held a series of three meetings in Oxford, Jackson and Biloxi, with reference to procedures. Such recommendations will be reported to the convention by committee chairman, Shelby Rogers. That concludes the discussion of the work of the various committees in our Association.

I'd like now to say just a few personal words, if I may. I've been told by men who held this office twenty-five years or more ago that being Bar President didn't take much time away from their practice. Well, I'd like to report to you that times have changed. There are now approximately three thousand lawyers in our Association and we have many committees and many meetings. During this past year, I have received some several thousand letters or communications of one kind or another. I estimate that I have written almost two thousand letters. Although I've enjoyed every minute of it, I want you to know that I am not a candidate for re-election.

There are several matters that I'd like to bring to the attention of this Association. Our present bar dues, thirty dollars per year, are insufficient to properly run the affairs of our State Bar and must be increased. We are at the bottom of the ladder among the states as to the amount of bar dues. Statements for annual dues have been mailed and you have noticed a plea for a voluntary contribution of an additional ten dollars per member. That request was approved by your Bar Commissioners and is necessary for us to operate. Your Association is indebted to the University of Mississippi Computer Center and to the R & D Center for their work on our Economic Survey Report. Next year it is likely that new publications and activities will require additional money. Our State Bar Association should set up a Client Security Fund with which to repay any person or client who has lost

money as a result of any actions of a member of our Association. Many bar associations throughout this country have such a fund. The establishment of such a fund would do much to improve the image of Mississippi lawyers in the eyes of the public. Under our present low standard of bar dues, however, it will be difficult to establish such a fund.

During the past year, it has been my privilege and pleasure to make a number of speeches as President of the Mississippi Bar Association. My wife and I have had the delightful opportunity of representing you at the annual meeting of the American Bar Association in St. Louis, the Mid-Winter Meeting of the ABA in Chicago, and the Southern Bar Presidents Conferences in Gatlinburg, Tennessee. We have just a short time ago been the guests of the Louisiana Bar Association right here on the coast during the month of April. During each of those meetings it has been our privilege and our pleasure to learn with profit what other associations are doing, and to form lasting friendships with a number of lawyers from other sections of the country. I am happy to report to you that, in my opinion, our Association and its work ranks with the very best.

Before I close, there is a matter of serious concern to lawyers everywhere that I want to mention to you. Within the past several years there has developed a breed of lawyers in this country who defy every rule in the book, and who pay no attention whatever to ethics in the defense of their clients. So far as I know that type of conduct has not come to pass in this State. I pray to God that it never will. If we, as lawyers, do not uphold the law, if we do not observe the rules of procedure, and if we do not adhere to the rule of law, then before long we will not have courts within which to practice. The Bench and Bar throughout all of these United States are greatly concerned with these developments.

I invite your attention to a quotation from an address given by Chief Justice Burger, who spoke to the American Law Institute a short time ago in Washington. Chief Justice Burger said this:

> With passing time I am developing a deep conviction as to the necessity for civility, if we are to keep the jungle from closing in on us and taking overall that the hand and brain of man has created in thousands of years, by way of rational discourse and in deliberative processes, including the trial of cases in the courts. Yet all to often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters, including the judges. At the drop of a hat, or even

> less, adrenaline-fueled lawyers cry out that theirs is a political trial. This seems to mean in today's context, to some, that rules of evidence, canons of ethics and codes of professional conduct, the necessity for civility, all become irrelevant. Civility is to the courtroom and adversary processes what antisepsis is to a hospital. The best medical brains cannot outwit soiled linen or dirty scalpels, and the best legal skills cannot either justify or offset bad manners. With all deference, I submit that lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice. We must have some basic decisions in terms of allocating the responsibility for regulating what is inherently a contentious profession, and then place rigorous powers of discipline wherever we place the responsibility. Lawyers, judges and law professors must see that an undisciplined and an unregulated profession will destroy itself, will fail in its mission, and will not restore public confidence in the profession.

So said Chief Justice Burger. Remember my friends, that it is the rule of law that we must observe if we are to survive.

Following me as your next president will be the Honorable Lester F. Sumners of New Albany. This Association has made a wise choice. Throughout this year I have had the advice and counsel of this man and his dedicated and loyal support. His service to this Association will reflect great honor, both to himself and to the Bench and Bar of Mississippi. I'd also like to pay tribute to Pat Scanlon, our Second Vice-President. He has been most diligent and effective in the work of this Bar, and I'd like to say that I deeply appreciate his cooperation. To George Van Zant and his most able staff, I extend my heartfelt and sincere thanks. Without their help and devotion to this cause, nothing could have been accomplished. I'd like to say that there are two people who rejoice that the end of my term draws near: My dedicated secretary, Donna McDowell, and my long suffering law partner, Lem Smith. I'd like to tell them that I am re-entering the practice of law again.

Now, one final word, and then I'm through. You know, the longer I live and the longer I practice law, the more respect I have and the more devotion I have for the law. America is built upon the concept of law and the rule of law. Taken as a whole, I don't know of any finer, more ethical group of men anywhere than lawyers. By that I mean to include all professions and callings, even the clergy. I am glad that I am privileged to practice law. During this past year I have heard some speeches which have enumerated all of the things that are wrong with this country: the divorce rate, crime and juvenile delinquency, the drug problem and just a host of other things. But I want

to tell you that through it all I have thought that for every ill which is suffered by this country I can recite so many things which are right with this nation of ours. Nowhere else in all of this world does a private citizen such as you or I have as many rights, as many privileges, as many duties and as many responsibilities as we have right here in this State and Nation of ours.

Hon. Gibson B. Witherspoon then introduced Hon. Leon Jaworski, President of the American Bar Association, who delivered the following address:

THE CHALLENGE TO STEADY PROGRESS*

Leon Jaworski

First, let me say to you President Bacon, that I followed with avid interest your report. It's a year of wonderful achievement, and I congratulate you and your colleagues most warmly on what you have accomplished. Now, in contemplating this address, I found myself on the horns of a dilemma. If I chose a controversial subject, I might well have the experience that a friend of mine had a few months ago when he made what he thought was really a non-provocative address on television. He thought his statements were largely innocuous. By the time he returned home, he had awaiting him a telegram and it simply said this, "Go to Hell. Offensive letter follows."

Now, if on the other hand I chose to be ambivalent, then I may sound like the old lawyer who was running for the Legislature, and who was located in one of the last citadels of prohibition. Well, he was put on the spot by the local newspaper editor who wanted to know how do you stand on the subject of prohibition and particularly the question of whiskey. The old lawyer thought awhile and then he replied: "Sir, you ask how I stand on the question of whiskey. I had not intended to discuss this controversial subject at this particular time, but I'm willing to discuss any subject at any time, regardless of how fraught with controversy it may be. Well sir, here is my stand. If, when you say whiskey, you mean the Devil's brew, the poison scourge and the bloody monster that defies innocence and dethrones reason and creates misery and despair . . . yes, literally takes the bread out of the mouths of babes, and if you mean that vile drink which topples the Christian man and woman from the pinnacles of gracious, righteous living into the bottomless pit of shame and despair and helplessness

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* This address has been abridged by the editor.

and hopelessness, then sir I am against it with every fiber in my body. But, if, when you say whiskey you mean the oil of conversation and you mean that philosophic drink which is consumed when good fellows get together, which puts a song in their hearts and laughter on their lips and a smile of contentment in their eyes, if you mean Christmas cheer, if you mean that stimulating drink which puts a spring in an old man's step on a frosty morning, if you mean that drink which permits a man to magnify his joys and happiness and to forget if only for a moment life's tragedies and sorrows, and if you mean that drink which pours into our treasury untold millions with which to provide tender care for our little crippled children and our aged and infirm, and to build schools and hospitals and roads, then sir I'm for it with all my heart. There sir is my stand and from it I will not retreat."

Perhaps, upon reflection, I thought that it might be best to stay with a subject that I believe is very important to all of us. I have sensed how important it was from the report that was made by your President. I've entitled this talk that I undertook to prepare especially for this occasion "The Challenge to Steady Progress." In these days of relentlessly changing times and conditions, members of the Bench and Bar are being repeatedly reminded of the imperative need to improve and modernize our court structures and procedures. This concern for improvement of our courts is not a new one. That objective was one of the founding purposes of the American Bar Association, in seven years to celebrate its centennial, and is, of course, one of its continuing objectives. Improvement of the courts is also one of the objectives of every state and local bar association, within their respective areas of authority and concern. Virtually every president of the American Bar Association in the last half century has addressed part of his effort, at least, to court improvement.

Now, let me take you back to the turn of the century and for a decade or two thereafter. Recently, I took occasion to explore the problems of concern to Presidents of the American Bar Association in those years. To my astonishment, in essence, they were similar to those that concern us today. They were then deploring some failures in our legal system. They were wondering how our criminal justice system would keep from breaking down. They sounded the alarm of the crime trend, and they spoke of juvenile delinquency. I could plagiarize their very works, their very warnings and their admonitions of fifty years ago and make them applicable today. Now, this is not to say that their warnings and their urgings were ignored. Indeed, they were not.

The organized bar at all levels undertook to meet the challenges,

and when we look in retrospect, the last one-half century has brought forth many reforms, many improvements and many innovations in the administration of justice, almost all of which were sponsored by bar groups. But as these were brought into being and served to alleviate some of the problems of the day, social changes and advancements followed to give rise to new burdens on the judicial system; as we face these vicissitudes today, they call for the solution of new problems and the meeting of new challenges. That our criminal justice system, for example, has not been able to keep apace of current demands in many jurisdictions is not to be denied. Does this mean that judges and lawyers have been apathetic and indifferent to the system's problems? Generally speaking, the answer is in the negative. And when we explore the reasons for the courts being engulfed in crowded dockets, let us not overlook several contributing factors occasioned by the granting of new rights to the accused in criminal proceedings.

Under *Gideon,* we all know that the indigent accused is entitled to counsel at the trial; under *Miranda* and *Escobedo,* his rights to counsel are extended to cover interrogation. Now, none of us would change the right of the indigent to be represented by counsel, and regardless of how some of us may feel about *Miranda* and *Escobedo,* the rules there enunciated are the law today and we accept them as such and we operate under them. Now, in addition, there has been an easing of the requirements to be free on bail.

All of these changes have been extensions of the rights of the individual, and these extensions have placed new burdens on society. Obviously, with free counsel available to the accused, there are now fewer pleas of guilty, the natural consequence being for the accused to stand on his constitutional and legal rights and compel the state to prove him guilty. Similarly, it is but natural that accused out on bail and fearing conviction will prevail on their counsel to seek delays. I, therefore, suggest to critics of the present delays and congestions that fairness demands that they make allowance for added burdens that have been placed on our courts by virtue of recent legal extensions of the rights of the accused.

Now, having said this much, let us take inventory of ourselves as lawyers in the light of conditions as they exist today. Not only is concern with judicial administration long-established, but so also is the list of needed and still necessary changes in our court systems. Many states have still failed to adopt fully the principles and techniques of modern judicial administration first promulgated by the American Bar Association's Section on Judicial Administration in 1938, republished and revised in 1961, and republished again this year.

Even while these improvements remain to be implemented in many jurisdictions, we are being presented for consideration a continuing series of other suggested innovations. Some of these are tested by experience and actually seem worthy of prompt adoption. Others are merely proposals, some of them having controversial or speculative aspects. Some of these proposals are: The use of electronic recording methods for reporting oral proceedings in trial courts; the use of "para-judges" or court commissioners to assume responsibility for pre-trial motions, discovery practice, calendar management and the like; the practice initiated by Chief Justice Burger himself wherein the chief of the court system makes an annual report on the state of the judiciary; and establishing computerized information systems to help maintain statistical information concerning the courts and to help them organize their dockets. In furtherance of these and other possibilities for changing and improving the administration of the courts, the new Institute for Court Management has been organized. This training center, located at Denver and sponsored jointly by the American Bar Association, the American Judicature Society and the Institute of Judicial Administration, is designed to train a new type of court official, the court administrator, whose function is to use modern administrative techniques to help the judges run the courts more efficiently.

A more controversial proposal, but one which nevertheless deserves attentive consideration, is to provide assistance from the federal government to permit the states to improve their court systems. This proposal, as you know, was advanced by President Nixon in his address last March before the National Conference on the Judiciary. A proposal along this general line has been the subject of discussion and debate in the pages of the American Bar Association Journal, and, no doubt, a number of you are following them with interest.

Perhaps the most significant among current additions to the agenda of court reform is the project known as the American Bar Association Commission on Standards of Judicial Administration. The determination of its proper scope is itself one of the Commission's chief responsibilities. The essential tasks of the Commission are stated, however, in the report of the Task Force which recommended creation of the Commission. Those tasks are: To compile and restate those principles of court organization, procedure, and management that have earned general assent and withstood the test of broad experience; to promulgate such a restatement as promptly as possible; to see to its effectuation throughout the states; and to devise new standards of quality and performance in judicial administration on matters which heretofore have received inadequate attention. And I may say to you

that only in the last two or three days it developed that there would be adequate funding for this undertaking to go forward. As the charter for this important undertaking says, the task will not be merely to devise improved standards, but also to work for their implementation, and when the time comes, it will be the responsibility of judges and lawyers alike to help implement the new standards, just as it has been our responsibility to continue the work for implementation of proposals that have already been devised and tested.

Let us remember that in the effort to improve the courts, however, we must observe another and equally significant responsibility—the responsibility to protect the courts from unwarranted criticism and from ill-considered innovations. An unavoidable part of the process of developing and adopting needed changes in the courts is to recount the shortcomings and even failures that exist. This is frequently done to stimulate public concern in the realization that without public interest it is often impossible to achieve the necessary reforms. But the overdramatizing of conditions can lead to a weakening of public confidence in the courts, unless the presentation is balanced with a recognition of the achievements we have made in administering justice, achievements resulting in a general level of efficiency and quality not paralleled in history.

The constructive critics of our court systems and our judicial procedures have been joined by a chorus of destructive critics who ask the public to believe that our courts are engines of injustice. The problems of delay are portrayed as deliberate withholding of the citizen's day in court. The attempts by judges to maintain an atmosphere of order and deliberation are portrayed as repression and coercion. The deficiencies in our correctional system, which everyone knows in many places are in need of massive improvement, are portrayed as an intentional policy of oppression. These attacks on our court system are unfair and unwarranted. They only serve to delay, confuse and make more complicated the task of achieving improvements that all responsible observers recognize are needed. Whatever be the existing defects, the aim of our courts is and will always be to render the most just form of justice that human society can succeed in devising. That aim is shared by every conscientious judge and every concerned lawyer. If we have fallen short of achieving the ideal in our court system and if we have tried to recognize and rectify the respects in which we have fallen short, it is nevertheless true that we have today succeeded in establishing a measure of administered justice that is substantially greater than a generation ago, and immeasurably greater than a century ago. It is a part of our professional responsibility to see that these

achievements are not obscured in our efforts to secure even further improvement. It is too easy, in contemplating what might be done to improve the administration of justice. If we overlook what has been done, we may fail to instill public confidence that yet more can be done to improve the system.

I am sure we all recognize particularly the importance of instilling that confidence in the young people of our society. We must, therefore, all join together in a professional commitment that we will at the same time work for the improvement of the courts and defend them against destructive criticism and unwarranted attacks. Let me emphasize that the question is not one of choosing between alternatives of reform on the one hand and affirmation of the status quo on the other.

In my visits to bar associations in many places throughout this past year, I find no failure to recognize the need to adapt our legal institutions, including our courts, to the changing demands imposed by changing times. But we must be equally as alert to the need of securing our legal institutions against the debilitating and destructive consequences that will ensue if the public should be led unfairly to believe that our courts are indifferent to performing their responsibilities.

There came to my desk recently an announcement of a book written by two sociologists, neither of whom is trained in law. The announcement stated, *inter alia*, that the authors were proposing "formulas for change that would bring about significant improvements in the nation's judicial system." With full appreciation of the contributions that sociologists can make within their proper sphere of endeavor, my strong reaction was that it would be most unfortunate if the job of refurbishing our judicial system were left to social scientists. There then arises the real danger that our system of justice would no longer be governed by the rule of law, but rather by sociological dogmas. But if our profession is not to exert a full measure of leadership in the administration of justice, we then must not be surprised to see our default result in a pre-emption by others of what actually is our own high prerogative. If we are concerned about the inroads of so-called "social democracy" on our present institutions of government, then let us lend our support to the functioning of all phases of our system of justice, so that the outcries of critics are silenced by its fairness and by its efficiency. As legitimate grievances are then dissolved, so will demands for revolutionary sidetracking of the system dissipate. This was the view of William Howard Taft early in this century. It is as true today. I think this is precisely the objective of the distinguished

Chief Justice of the United States when he sounds warnings and presents constructive programs for improvement.

There was something that Mr. Justice Harlan said in 1963 that is most appropriate for us all to bear in mind these days:

> The leadership of the Bar at the community level is becoming more and more a thing of importance in connection with many of the burning issues of the period. Their solution requires objectivity, understanding, patience, willingness to reckon with the just demands of history and, above all, insistence upon steadfastness to the orderly processes of our system. The Bar has a peculiar responsibility for furnishing these qualities in great measure.

I want to acknowledge, if I may, on behalf of the American Bar Association, the many contributions this Bar has made through the years to the work of the American Bar. I do not know how many of you have thought of it, but though the American Bar Association has a powerful voice and consists of a hundred and fifty thousand members, the most it can do is appeal to the reason and conscience of others, and the work, as Mr. Justice Harlan said, must really be done at the local level. But to enable the American Bar Association to be the spokesman that it is, and for it to wield the influence that it does, we must depend upon the work of devoted individuals who have served us so well, and this Bar has supplied many of them. Thank you.

President Bacon then introduced Hon. James W. Jeans and Hon. William H. Sanders, who delivered the following special presentation:

HOW TO TRY A LAWSUIT*

For the Plaintiff: James W. Jeans

For the Defendant: William H. Sanders

Mr. Jeans: Rather than getting into the mechanics of trying a lawsuit there are factors that initially must be considered: What a lawsuit is and what an advocate seeks to accomplish in representing a client in a lawsuit. I think too often we neglect to give this preliminary thought before we get involved.

When we hear someone say I am going to hear about how to try a lawsuit, you do not want to talk about the philosophy of it, and you do not want to talk about the preliminary approaches; you want

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* This address has been abridged by the editor.

to talk and you want to hear about the "angel," the little trial gimmicks and ploys, the magic question that you ask that turns defeat into victory. You want to hear about some of the romance of making a closing argument. But I think that we would be remiss if we attempted to approach a topic as broad as this without asking ourselves what it is that a trial lawyer is trying to accomplish. What is a lawsuit anyway? Is it a search for truth? Is it a search for justice? Are those two things incompatible with each other?

Mr. Sanders: Once I was asked to speak with two or three other lawyers on a most difficult subject, "Lawsuits That I Have Tried and Lost." And you know, the three of us that were on that program looked at each other and we had total amnesia. Our minds just could not work back on how we did happen to lose the cases. If they had asked us to talk on lawsuits we had tried and won, we could have talked for three days, but talking about and thinking about the cases that you lost is the hardest thing in the world. But, Jim, if I had to analyze, how do you lose a case, I cannot really say that I've lost a case because I called the wrong witness, or maybe I should have offered an exhibit that I did not offer. I think that probably the mistakes we make to lose a lawsuit are those that we make when we are formulating the theme on which we are going to try the lawsuit, the basic proposition that we are going to submit. I think the selection of the theme of your lawsuit, probably at the time you draw the petition, controls as much as anything else whether you win or lose a case.

Mr. Jeans: Let me share with you a poem that I think has some validity by Lord Alfred Tennyson, "Flower in the Crannied Wall." Tennyson wrote: "Flower in the crannied wall, I pluck you out of the cranny and hold you here in my hand, root and all. Little flower, if I could understand what you are, all in all, root and all, I would know what God and man is." Tennyson realized that the flower was a microcosm of the whole of eternity. Somehow I feel that a lawyer has to sense this too. Frequently there is in a simple approach to a problem an answer to what appears to be terribly complicated. I think that we have to have an idea of what the Germans call *gestalt,* the totality of a problem. The idea that one does not try a lawsuit in sections, that we do not speak of cross-examination in a vacuum, we do not speak in terms of pleadings in a vacuum, we do not talk in terms of a closing argument in a vacuum. There has to be some total theme, some kind of a main thrust that has to be decided upon early in the case. This is the first thing that any trial lawyer undertakes.

I heard a gentleman give a very interesting talk one time that drove this point home very dramatically. His firm gave a name to

every case that came in the office, in order that they could appreciate the fact that there is one idea that is encompassed in particular lawsuits. For example, if they had a case where a child had been struck in a school zone by a speeding automobile, it became the case of the violated traffic signal. Repeatingly referring to it in that fashion highlighted the simple, single factor that was the key as the complicated litigation developed.

Mr. Sanders: When we are talking about themes, I think we also have to talk about the theme of credibility. I think in trying lawsuits that the problem of credibility, the credibility gap, bothers me more than anything else. Generally, I worry about the credibility of my defense, my defendant, and my witness. However, I am always worrying about my credibility.

Mr. Jeans: I think it is a fair statement that many lawyers get less credible as they get older. There's a delightful essay written by G. K. Chesterton called *The Twelve*. Chesterton, writing in England seventy years ago, served upon a jury on one occasion in the trial of a boy for theft of a bicycle. As he sat there and looked about the courtroom, he saw the bailiff going about his business in the usual, routine manner; he saw the judge who was in a familiar place doing the familiar thing; and he saw the lawyers themselves involved in a rather casual way. Chesterton, serving as a juror for the first time, caught the magic and the awesomeness of dealing with a judicial matter. He observed that the best argument that could be advanced for the retention of the jury system was that he did not want anybody who had become so casual through an overexposure dealing with the problem of what to do with the boy accused of stealing a bicycle.

Sometimes I think that often an experienced lawyer involved in this matter of adjudicating civil or criminal matters becomes too casual. He becomes a familiar person doing a familiar thing in a familiar place; he loses his sense of awesomeness. And sometimes I believe that the most effective counselor is the one who has that sense, perhaps that sense of hesitancy.

I think that there is no advice that can be better taken than "to thine own self be true." I think too often we try to mimic someone else and in doing so we lose our credibility. I started to practice with a little fellow about five foot two, who was thirty years my senior. In court he used to lash into witnesses and the jury loved it. "Look at that little rascal, that little bulldog, isn't he great." Well, I tried doing that a couple of times and I came on as a young bully. Right away I decided that you better develop your own sense, there being little

value in mimicking somone else and their particular style. This is all part of the credibility, I think, that we have to establish.

There was a Roman orator by the name of Quintilian who was asked one time what made a good orator. I am sure that the person who asked the question expected to get an answer such as, "Well, a fellow who can enunciate clearly, some fellow that has all of the gifts of a rhetorician, a person who has a broad command of the Latin language," in those particular days. Quintilian thought a moment and he said, "An orator is a good man who speaks well." I think that this is really the test of a trial lawyer. What is a good trial lawyer? It is a good man who tries a lawsuit well. I think too often the emphasis is upon the mechanics; you know, the fellow with the clever bit of phraseology with the closing argument, or the particular way in which he can probe on cross-examination. I think that perhaps the emphasis should be shifted as Quintilian shifted it. When he said "a good man," I think he was saying a credible man, a man with integrity, which goes back to the theme. Integrity, which means wholeness, a certain wholeness, a certain *Gestalt*, a certain integrity about the person he is representing, the theme that he has chosen for his lawsuit, the sincerity with which he tries it.

We started off talking about credibility, the integrity of a lawsuit and adjusting a theme. I think the most important question that a plaintiff's lawyer can ask of his client is why he thinks he ought to recover. I think a lot of times we get caught up in the procedure; we take the facts down from a client and we let it go there and we develop our own ideas as to why "we" ought to recover. Take a case involving a slip and fall in a grocery store. Ask your client, "Why do you think you ought to recover?" "Well, I fell, I am hurt, that is enough." You say, "Well, that is not enough under the law, why else?" "Well, I got hurt. I was in the Kroger Store. I bought some groceries." You say, "That's not enough." "Well, I slipped on a banana peel." "That is not enough." "The banana peel was there for a half hour before I fell." "Now you have it!" "Now we know why we are suing, you see."

Mr. Sanders: Wait a minute. Let me tell you how the defendant does it. I have always known the plaintiffs' lawyers do that; they get the leading case in there and then they leave the room for about five minutes. When they come back they have a lawsuit! I am always concerned about the credibility gap that you have with your own defendant. Let me mention how we do it in our defense office. I am assuming that we are down close to the trial time. We have lawyer's time to sell and nothing else, just pure time. So, the first thing we do with a de-

fendant when he comes in, before the trial, about two weeks before the trial, is we make him read the entire file; it is mandatory; we keep him. We have a young man that checks him to make sure he has gotten all the way through the file. It is only after he has read the file that we start doing anything about seeing that he will be a credible witness in the court room.

After he has read the file, the man that is going to try the lawsuit has to re-enact the entire situation with him. We re-enact completely, step by step with the defendant, everything that he does, or did, rather, in connection with the occurrence that leads to the lawsuit. Then it is only after we have gone through the whole thing, step by step, that we sit down and we start talking with him. If it is an intersectional case or an automobile case, it is mandatory in our office that he has to draw a plat of the accident scene. If he draws the plat himself, he will know those measurements and never forget them.

If I am going to try the case, I go through with him every question I am going to ask him, and we go through it slowly, so that I do not have a flustered defendant on the witness stand. I have a man who has probably spent three hours with me going through the questions I will ask him on direct in twenty minutes. I give him plenty of time to think about his answers. He and I attempt to evaluate the answers the way that a jury will. If I have any real difficulty in getting the man to speak and to articulate I say to him, "Well Mr. Floyd, you have got a man dead here, a man six feet under the ground; do you really think that you are to blame for this man being dead?" Sometimes it is only when you really go in and gig your defendant that you can get him to articulate and to speak.

When I get through the questions that I am going to ask him at the trial, I will bring in one of my partners, and he will put that man through the toughest, hardest possible cross-examination that he can. The end result of it is that when we take a defendant into the court room, our man is a credible witness, because he is completely at ease. He has been through tough, hard grueling questioning.

You can convince the defendant that being questioned is not really very tough, because he has been through it. He has been through the mill. If you can convince him that the lawyer is really the one that is carrying the lawsuit, carrying the responsibility, you go a long way towards getting that relaxed, easy-going witness that can fend off the questions that your plaintiff lawyers are throwing him right and left.

Mr. Jeans: The plaintiff accepts part of that burden of proof, the burden of initiating the action, and he is the man that will be the

first one on the stand and in most cases, the first lay witness that will testify, a new experience to him. Surprisingly, I find that most plaintiffs are very hesitant in describing their injury. One of the gimmicks that the insurance companies have perpetuated is the idea that everybody exaggerates an injury. I've not found that to be true.

For example, what happens when a woman falls down? The first thing she does is pulls the skirts down over the knees. She is not thinking about injuries, she is embarrassed; and a lot of times it is difficult to get people to express an injury because they are embarrassed to talk about the injuries. One of the most difficult things is to try to get medical testimony to substantiate a loss of consortium claim, because nobody wants to talk about the intimacies of the ill effects of an injury that they have suffered.

After you get rid of the business about why do you think you ought to recover, I think sometimes it is well to ask them how much they think we ought to sue for? If they say X amount of money, ask why they think that somebody ought to give them ten thousand dollars for this injury. You have to tell them that a jury has to be concerned, and for a jury to be concerned, they have to be concerned and demonstrate to a jury why it is that they have this evaluation of their own injury.

I want to introduce at this stage of the game something I think is of substantial importance. You have talked about establishing credibility and from my experience you not only have to tell them what to say, you have to tell them how to say it. Most of us concern ourselves with demonstrative evidence when we are talking about proving an injury or proving a liability. We are talking about photographs and plats and all the rest of that business, but you and I recognize the fact that about ninety-nine percent of our case is going to be presented orally. When it is presented orally, it is coming from the mouth of the plaintiff primarily, his witnesses and his lawyers. And I believe that it is mandatory for a plaintiff's lawyer to let these people know the importance of establishing some vivid picture in the mind of that jury, so that they can apprehend not only how an accident happened, but the results of the accident.

If you are trying to sell a soft tissue injury in a rear-end collision, where there has been thirty-five dollars property damage, you have a tough job, unless that plaintiff, in describing how that accident occurred, can use words that are going to create in the minds of the jury some type of an impact that will justify all these complaints that followed from it. Suppose the plaintiff were to say, "I was stopped at the stop

sign, and the car in back came in contact with my bumper." That is about as dull a recitation of a fact as you can imagine; there is no imagination that is created within the mind of the listener. However, if he said there was a sharp unexpected impact, you are using words that have a little more color. The fellow from whom I learned how to practice law never talked about a truck coming down the highway; trucks always thundered down the highway. The defendants do this, they have this thing locked up. Have you ever heard about a four or five year old kid coming across the street when he was hit by a defense lawyer's client's automobile? What do the kids do . . . they dart! I have had two year old kids darting. "Dart" is a good word, it is a color word, and I think you have to tell these people about the use of color words.

Now, one of the things that makes it difficult is this, that the more sophisticated a person is, the less he is apt to use color words. You get a fellow lawyer who has been injured with a shoulder injury, and you say, "What is the effect of it?" He'll say, "I will not be able to raise my hand any higher than the level of my shoulder." There is no color there. There is no image that pushes into the mind of a juror. You ask an unsophisticated day worker what happened and what the effects of that injury are, and they will say, "Well, the other day, I was reaching up in the pantry for a bottle of preserves or something and my arm gave a twinge. I cannot hang my clothes up any more." They will use all kinds of expressions, you see, in their unsophisticated way, that are good color words. I have my biggest difficulty with these sophisticated plaintiffs, who insist on talking in the abstract and do not create any of these color words.

Mr. Sanders: I like that expression "sophisticated plaintiff." I have had a belly full of sophisticated defendants. I am amazed at the capacity of the human to lie. We will have a defendant walk in who has a million dollar umbrella policy, and he seems to feel that it is a condition of his policy that he has to lie for the defense. I am not just touching base on credibility; I think credibility is what wins lawsuits. If a man is inarticulate, if he is clumsy, if he is a poor lawyer, basically, if he has a truthful, credible lawsuit, he is going to win that case. One of the biggest problems that I have is convincing a man that the insurance company does not require him to lie. Liars lose lawsuits. Do you not agree?

Mr. Jeans: Agreed. Having the choice between a credible, inarticulate client and one who is articulate with some question as to his credibility, I prefer the first every time; but there is no need for a good lawyer to make the choice. I think the most effective thing I

ever saw in a lawsuit happened when I was representing a gentleman that was about sixty-five or seventy years old—just as nice a looking guy as he could be—and he had to establish his case with the testimony of one witness. He was the only witness that was there to justify the nature of his claim, and on cross-examination this defense lawyer just "bully-bragged" him up and down and he said, "Why you know that your whole case is wrapped up in the testimony of John Jones, don't you?" He said, "Yessir." The lawyer asked, "And John Jones and you have worked together for thirty years, haven't you?" He said, "Yessir." Then the lawyer asked, "And John Jones is your friend, isn't he?" And he leaned back and he said, "Mr. Lawyer, everybody is my friend." I could have kissed the guy; they called a recess and the case was settled right there. The fellow was too credible to be impeached!

But aside from this, I think that it is necessary, as I say, to buttress this credibility, if you can, with the use of good demonstrative words. You know Aristotle made the observation that men think in terms of images. Now think about that for a minute, think in terms of images. I cannot say the word "bear" to you without even thinking of a bear. If you are thinking with me, and you had a bear in your mind I do not know what kind of bear it is—is it a polar bear or a brown bear? Now, I don't know how you think, but the bear is in context some place, he is in the woods, he is in the zoo, he is behind bars. Now, I have not told you where he was. Is he alone or are there two or three bears along with him? He is all by himself. We have one single bear. Is he lying down, on all fours, or standing on his rear leg? See, every time I ask a question of you, the very asking of the question drives into your mind some response, and I could keep going on: is it winter, is it spring or is it fall? Is he in profile, is he facing you? Every additional fact that I ask you is going to drive something in.

Now, there are the jurors sitting there and they are listening to you describe something. You are not talking about bears, but you are talking about automobiles, you are talking about streets and you are talking about injured arms. Although I think it is very important that when that person takes the stand he swears to tell the truth, the whole truth and nothing but the truth, it is the duty of the lawyer to paint the true picture of that bear and not let it go unfilled so that the jury can fill in the details themselves. This is why I think that it is necessary for you, as lawyers to fill in these details with colored words, so that they have, not some illusory image, but something to zero in on. It is related to seizing upon words that will drive an image into the mind of the jury, and with anything less than this, in my judgment, you are not fulfilling your duty to your client.

Mr. Sanders: More than that I think it is the ability of the advocate to get his client, or his witness, at ease, so the man can speak naturally. I remember a case that I tried with a marvelous witness I got out of the Missouri Ozarks. When I went through the usual business, "You were subpoenaed to be a witness?" "Yessir, Mr. Sanders, and I told the sheriff I would be there, God willing and if the creek runs dry." Now, to us Ozarkers that is a beautiful way that we talk. That man was coming through completely credible, because he was talking in his own vernacular.

Mr. Jeans: More good lawsuits are lost by liars, of course, than lousy lawsuits are won. I feel it necessary, even when there is absolute liability and a legitimate injury, to look the client right in the eye and say, "There is only one way we can lose this lawsuit, if you do not tell the truth."

You know the old technique that most plaintiffs' lawyers use: you have got four injuries at the time of the accident and come trial time you are only complaining about one. A lot of people say, "Well, I think I had better fudge a little and say my neck still hurts when it really does not." But it is more credible when the person says, "I had neck aches, I had knee aches, I had headaches and I had the back ache, and the back ache and the headache and the knee ache is all gone, but that neck of mine has been giving me fits, man." That is going to establish credibility, in my judgment, rather than dissipate credibility.

Mr. Sanders: I have often watched plaintiffs' lawyers blow credibility on voir dire. When I see you up there being overly complimentary to the jury, you are fawning on the jury. You know that business of, "What do you do?"

"I am a housewife."

"Well, that is quite a job in itself" and so forth. Old malarky like, "Oh, you work down at the bag factory. I used to work down at the bag factory when I was going to law school. Do you know Joe Potter," and so forth. You are not credible. I think that the average plaintiffs' lawyer loses all, not all of it, but a good part of that credibility that he is striving so hard to establish wearing his plain black suit and so forth. When, on the jury examination, he is trying to win the case by being Mr. Dale Carnegie.

Here again, I think you get into the fact that it is an individual approach. I feel phony when I do that kind of sitting in the jury's lap, although I have seen some lawyers who could handle that beautifully. I often hear the trial lawyer say, "Well, I did not ask that

on voir dire. I just did not want to offend the jury." Now I say take your chances, and if necessary, offend the juror. Well, I go barreling in and I want the answer on voir dire. To me, voir dire is not a popularity contest. I try to be polite; I try to be respectful and civil. However, if a juror has not got a left arm, I want to know how it is going to affect his judgment in the case, and I will single it out and say, "Mr. Jones, I do not like to talk about anybody's disability, but I notice you have an empty sleeve, and we have a darn serious injury here." I always ask him, "If you've got that arm off, do you think that you can really be impartial as far as the defendant is concerned, because I am here to see that the defendant gets a fair trial."

Mr. Jeans: I agree with that up to a point. I think if you have some circumstance in your lawsuit that has to be brought to the jury and will be a definite part of that lawsuit, you have got to frankly bring it out. If you are representing a fellow in a black jacket and riding a motorcycle, at the time he gets involved in an automobile accident, you had better ask that juror how he feels about people with long hair or black jackets or motorcycles. If you have a hitchhiker, if there has been drinking in the case, these things have to be had right at it at the time.

However, I think it is important to establish a rapport with the juror. Aside from getting information, you are introducing your case, you are putting it in a nice light. I think that you have to create an opportunity for the juror to feed his own ego. You know, there isn't a job now that sounds like a menial job. People do not work on production lines any more, they are quality control experts; they are not janitors, they are maintenance engineers. You do not need to ask more. Now, I do not think you are being phony when you stay away from that kind of questions, when you don't know exactly what the work details are, when you can see by the fellow's dress, when you know by his address, when you can tell by his very demeanor that undoubtedly he is involved in a menial task.

Mr. Sanders: I cannot agree. I argue that you have to go in and search out all of that man's background that the judge will let you do, because I am not looking for rapport at that stage. I am not trying to win my lawsuit on the voir dire. I am looking for identification. For example, the last case I tried was one where I was defending an insurance agent on an errors and omissions claim, where I knew that my agent had not gone by the manual. He had not followed the rules and regulations in the manner in which he had written the policy. Now, I had to know from each of those jurors how much of their life was spent by living under rules and regulations. I believe in an exhaustive and extensive interrogation, because I am trying to establish rapport and

identity with what I know is going to come up in the evidence, in the case.

Mr. Jeans: When it comes to opening statements, nothing offends me any more than a lawyer who gets up and says first of all, "Well, we hope to prove. . . ." There are a lot of plaintiffs' lawyers who start off that way, "Well now, we hope to prove," or "We think the evidence will be."

Mr. Sanders: One of the best plaintiff lawyers that I know, one of the most dangerous opponents that I have, makes a very full and a very complete opening statement, but you cannot really tell whether he is the plaintiff's lawyers or the defendant's lawyer the way he makes it. He gets in and he discusses fully and completely all of the evidence against him.

You have the immediate impression that it is a low key opening statement, but actually it is devastating because that fellow is getting out of the way immediately all of the evidence that he knows is going to be thrown against him.

I have decided that I have lost my share of the lawsuits, as much as anything else, by making too strong, too partisan, too baised an opening statement. I used to be proud when a lawyer would pat me on the back after an opening statement and say, "Bill, that was the best closing argument I ever heard." I thought that was great. Now I have stopped doing that, because I was always going downhill . . . my case was never quite as good.

Mr. Jeans: In the Midwest about sixty-five percent of all the cases that are tried result in defendant's verdicts. I mean the defendants are having a field day. But the problem is that the people are becoming cynical. I think it is part of our social change. I think there is too much compulsory charity in the socialistic type of government that we are approaching. I am not saying this in condemnation, but in observation. I think that people hesitate to give recoveries. They know about Blue Cross; they know about all kinds of other benefits that a person will have; and they do not think that a person needs the recovery in a lawsuit as much as he did fifteen or twenty years ago.

The statistics are bad for plaintiffs, and so a plaintiff, in my judgment, has to exude a tremendous amount of confidence in his case from start to finish.

Mr. Sanders: Do you prepare an opening statement?

Mr. Jeans: I think your whole case is developed when your plead-

ings are made. We have form instructions in Missouri. I can go to the form instruction book and I find out what the jury will be instructed in a case. I use that same language in my petition and in my opening statement, so that the jury is going to know what that issue is. The result is that they are going to know the issue in the words that the judge is going to give them at the close of all the testimony. When do I form the opening statement? I would say at the time the pleadings are formed, you will get the outline of it and the guts of it right there.

Mr. Sanders: An example of what you are talking about is our language in our form instructions of failure to keep a careful "look-out." We are limited to that language by the instruction. More than that, you do not question a witness about did you look to your left or did you look to your right, because you know what your instruction is going to say. You are constantly saying to the witness, did you keep a look out to the left, or did you keep a look out to the right, so that you have the theme of your instructions running through, not only the opening statement in the pleadings, but the form of the question.

Essentially, what we are talking about is credibility. You are trying to establish the credibility of the plaintiff and I am trying to disestablish the credibility of the plaintiff.

Mr. Jeans: I would say this also that you ought to end an opening statement by telling the jury what you expect of them. Here again, sometimes this cannot be too lengthy, it gets into an argument and it is improper, but I think it is well to end an opening statement by saying, "And upon the conclusion of the testimony, we are going to ask you for a verdict of ten thousand dollars in favor of the plaintiff," if you know at that time how the testimony, you feel, will develop and if you have enough confidence in your case to mention an amount. But I think you ought to tell them what you are going to do. You are going to hear this for this result, and upon hearing this testimony, we are convinced that you will find that it was the defendant's failure to swerve that caused this accident and that caused the injury to the plaintiff. I think you ought to wrap it up by telling them what is expected of them, after making your opening statement.

Let me start off the discussion on direct examination because the plaintiff, of course, starts off with the direct examination. This is where the plaintiff's lawyer plays the role of the fellow who is creating the drama.

The books tell you the order that the witness should come in, and that is always very interesting in a sterile, classroom situation. Our problem, at least in the cities, is that the availability of the wit-

nesses is so touchy, especially if you have a three day case and maybe four, five, six or seven witnesses. You just cannot put them in a room and pluck them out when you want to. You usually have to arrange your witnesses around the professional man and sometimes the chronology is upset. However, I really think the one thing that a plaintiff's lawyer has to have is some order, if at all possible, in the presentation of the testimony. There has to be a gradual build up.

Although, these are all more or less axioms that everybody has heard, I am more and more convinced of their validity—the idea of establishing this drama so that it is going some place, establishing your individual testimony, so that it is going some place, so that you have some sense about it. Make your minimal case and keep it dramatic. If there is going to be any drag, let it come from the cross-examination. The jury will liven up when you are on the stand; they are just going to sit back and say here comes that lengthy, droning cross-examination now from the other side. To me, that is the most important thing—keep it moving.

Mr. Sanders: I buy what you say, but I would make some modifications on it. First, drama means a lot and most lawyers do not end the day on a dramatic uplift. The really good trial lawyer always ends each day, when he is putting on his direct evidence, with a good witness, with a good point, so that the jury leaves at night with that point in their minds, highly favorable to his client. And while I agree with you that we lawyers are much too repetitive, you have always the situation where you want to emphasize the highpoint of your case.

The old time trial lawyers, men who are now in their eighties, were terrific showmen. When I was a young lawyer, I would marvel at the way they could ask a question, in their theatrical way, that could make the big question sound just like they were ringing a bell. Today, of course, the jury won't accept the showman in that sense, and so to get emphasis, to drive home the point that I want to, on my direct examination, I use this method. I pause at the beginning with a witness, and I wait until he is at ease, and I piddle around on my first questions on direct examination. You know, how old are you, where do you work, how long have you operated a crane and so forth, until a man gets over fidgeting in the witness stand. I am watching his face and his physical being very closely. When I sense that his adrenalin is not pumping particularly fast and that his blood pressure is slowing down, which are all physical factors you have to watch, then I start going bang, bang through my direct evidence, until I get to the highpoint that I want to prove. Then I go over it detail by detail to get my emphasis.

Mr. Jeans: I think the point made about emphasizing is important, ringing a bell and letting the jury know this is going to be important. We are allowed, in our state courts, to sit down while we interrogate; we stand in our federal courts. A change in posture can say to the jury, here comes a biggy—if you have been sitting down interrogating, just standing up and saying, "Mr. Jones, how fast were you driving, as you entered the intersection?"; that is just like putting in an exclamation point.

One more point, if you are allowed to roam around, when the more important testimony comes, I like to stand a little over toward that jury box, so that even though the witness is talking to you, his gaze is more toward them, and he is projecting to the jury. Hopefully, you start sublimating yourself front stage center. Emphasize the important questions in that fashion.

Mr. Sanders: You can also pick up emphasis by the long pause; you can sometimes stand for maybe ten or twenty seconds mute, after a witness says something.

I think you have always got a tough problem on direct examination of whether you keep your witness on a tight leash or whether you let him roam. To put it another way, whether you ask him the broad question, "Now, Hiram, tell us how the accident happened?"; or do you take him on the tight leash and say, "Hiram, you were going how fast as you were proceeding?" I think you have got to play your witness. I more or less cross-examine my own client to get that emphasis—you know, "Why did you not swerve?" "Well, I could not swerve, there was the on-coming traffic!" "Well, why did you not blow your horn?" "Because I had both hands locked on the wheel and I was riding the brakes as hard as I could," and so forth. I can get emphasis there by an argumentative type of question, that not only socks my point home, but is asking your questions ahead of you so that I have my own witness answering to me.

Mr. Jeans: I think one of the biggest problems the plaintiff's lawyer has is with doctors—getting them to court, getting them to testify with any animation or any excitement, or getting them to understand the difference between legal causation and medical causation. These are real chores that we all face. Doctors and scientists, do not think in the same way that we do as far as causal relationship goes. For a plaintiff's lawyer, and for the law, causation is anything that initiates something, aggravates it, anything that stimulates it. When you start talking to a doctor, however, and if you use the word "cause"—has this caused this—he is going to back away, because as a man of science he is taught that there have to be all types of clinical tests and

all kinds of assurances that this has initiated the thing. They do not talk in terms of aggravation or acceleration; they are only talking in terms of initiation. Cause to a man of science means a certain sense of relationship that is ninety-nine percent certain. Even doctors now will not say that cancer is caused by cigarette smoking. They say there is a higher incidence of cancer among cigarette smokers than among non-smokers. Is there a relationship—they will be willing to buy that, the word "relationship," but they will back away from "cause." So, there is not only the problem of the doctor reading a report, but also a question of the doctor understanding what you are trying to do, and what relationship you have to have.

You know, doctors, more than any other segment of our society, I believe, are the most cynical when it comes to personal injury claims. A lot of times their professional opinion is colored by their own personal opinion as to whether or not Mrs. Jones should recover or not, or whether his, the doctor's, insurance premiums are too high. So, you have really got a selling job with doctors, at least in a metropolitan area.

Mr. Sanders: When I put doctors on for the defense, I never, never let a doctor read his report, because just as he starts to read, I start jumping around in his report, and it bothers the doctors no end. I know how his report reads; he starts at the head and he works down to the X-Rays. Maybe I will start out with the X-Rays first. Then I always make the doctor show me and the jury what he did. For example, when he does the reflex test, I sit on the edge of the table and I let him tap my knee, so that visibly I am going through with the defense doctor just exactly what he did on his examination. It comes through to the jury much clearer when they see you demonstrate what he did during the examination. I imagine I have been examined by a defense doctor at least a hundred times in the court room. It is always effective, and it is a way to stop the doctor from reading his report.

Mr. Jeans: I think it is very presumptious for someone to tell another how to make a closing argument. This is such a personal thing, related to your own personality, the kind of a case you have, the kind of opponent you have. The only general rule that I have found that has some validity is that the first half of the plaintiff's closing argument should be rather calm and deliberate in talking about the law and making all the points. Arguing from the instructions, I have found, is always effective. Most of that second half, I think legitimately should be rebuttal; you are making your notes when the defendant is making his closing argument and you answer him . . . you have to answer him.

I also think it is a good technique for a plaintiff, who has the

initiative, who has the ability to lay the groundwork for that closing argument, to keep that defendant busy, not to make an innocuous closing argument on the first half. Make him answer you. In the second half I like to shoot from the hip. I like to make a true rebuttal. Put opposing counsel in a defensive posture. As soon as you let the pressure off, he is going to seize the initiative and you will be trying to answer his questions. I think that the role of the plaintiff's lawyer in the first half of the argument is tremendously important: keep the initiative, put the pressure on him, keep him in a defensive posture, raise all the points in a somewhat sublimated fashion, then reach the peak of your emotional appeal in the last half.

Mr. Sanders: I almost always try a case with the second man in the court room with me. We do not talk about our side of the case. We try to imagine that we are sitting on the jury and thinking what they would be thinking. This is how I always start a defense closing argument. I would then hammer home the instructions. I think that instructions are the most powerful argument that either the plaintiff or the defendant has. Most lawyers, for some reason, seem to ignore instructions in their argument. I emphasize, from the beginning, the duty of the jurors to follow the law. That works equally well for the plaintiff too, because the plaintiff can argue, for example, there is no basis for compromising the verdict. You swore that you would return a true verdict, according to the law, and the law says you have to award him such sum as in your judgment will reasonably compensate.

Mr. Jeans: A technique that is often effective is to try to identfiy your plaintiff's case with some broader issue. If you represent a child that has been hit, you are talking about safety on the streets for every child; you try to inject the idea of penalty. It would be interesting to know how much of the jury verdict is based upon compensation and how much is based upon penalty to the defendant. If you have not got romance in your lawsuit, something you can get mad about, you usually do not get much of a verdict. This is where that second half of the closing argument comes in, where you have to establish some inflammatory type of a punitive action against the defendant. I am not talking about formal punitive action; I am talking about the idea that you have to build up the fact that there was fault. A lot of our theories now are based on no fault situations—strict liability, res ipsa loquitur. These are the poor cases because they have little romance in them. They minimize the human error and consequently, they lower the amount of a verdict.

Mr. Sanders: I cannot let you get by with this romancing the plaintiff without mentioning that the defense can romance the defendant. If I have the individual defendant, I remind the jury of the

financial seriousness of what they are doing. I like to take my billfold out, and I say, "Plaintiff's counsel is talking to you about big money. He is talking to you about cash. He is talking to you about cash just like this cash I am holding. Whatever you do and whatever you say this court has got to enforce. He is asking you for a cash verdict—a verdict in actual dollars. I do not know how much money you have in your pocket, and I do not know how much money you have in your savings account, but I know what money means, because I have had to work my way through law school. I have had to pay my bills at home. He is talking about a verdict that is binding upon this defendant; one that must be carried out by the court. You can walk out of this court room and you can say to yourself, oh, I am forgetting about the lawsuit, but the court cannot, because it has to enforce that which you do, and that which you do is binding on this defendant." You know that puts your defendant in a mighty romantic light, because no jury wants to take his home away from him!

Mr. Jeans: I think that all of us have to continually remind ourselves that we are involved in an awesome job of administering justice, and sometimes we get caught into the delightful little stories that all of us know, the war stories that go with the trial of lawsuits. But, I have often thought that we lawyers ought to have a patron saint, and if we had one it would be Gareth, a member of King Arthur's Roundtable. Gareth was a young man reared in luxury having all the benefits of the castlekeep. As he became a young man he told his mother he was going to leave to join King Arthur's Roundtable. In answer to his mother's question of why he must go, Gareth said, "Oh Mother, why do you keep me tethered so? Man I have become and man's work must I do, follow the deer, follow the Christ, do good, right wrong, for wealth wherefore born." And what a delightful theme for us as lawyers. We have that tremendously heady experience of being able to right wrong, and to be able to do good, and if we do not do that, I think we have to ask ourselves, as professional men "Wherefore born." That is the role of the trial lawyer.

President Bacon introduced President-elect Lester Sumners, who delivered the following address:

INCOMING PRESIDENT'S REMARKS*

Lester Sumners

The program says that I should make some remarks. I will tell

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* This address has been abridged by the editor.

you only this—I have already begun to enjoy the fringe benefits of this office. During the last year, Joyce, my wife, and I have been very happy to attend other conventions of other bar associations, conference meetings and ABA meetings, as representatives of your Association. This is a great deal of fun, and it has been very informative to us. From this we gather information that helps us in planning programs and work for our own Association. The coming year is going to present us with some continuing work that is still in the mill, and we have several projects that we want to see get started.

I think you might like to know that two of our committees are going to be staffed by the Young Lawyers Section. We have concluded that there is so much energy and talent in this segment of the Bar that we are going to turn over to them for the ensuing year the Public Relations Committee, with the view, not that this will function as a press agency, but with a view to developing a program of presenting the Association and the work of attorneys to laymen. The Young Lawyers also are going to completely staff the Law Day U.S.A. Committee. I hope that they realize the tremendous responsibility that they have this year, in view of the fact that Gipson Witherspoon is a national chairman. It is going to leave the finger pointing at Mississippi and I'm sure that they will do a good job.

Billy told you that one of his recommendations was revision of our complaint procedure and client security fund. Everywhere that we have been it has been very evident that all other associations are feeling this tremendous pressure to get our houses in order so that we do not become the victim of the public press type attack that has been generated against other organizations and institutions. This is going to have the number one priority. That committee has already been appointed; the material is already being gathered, and we expect that we will be well into it before this year ends. Hopefully, we will conclude it, but I rather doubt it. It's a major job, and it's one that we simply must get to work on.

The fee schedule has obviously got to be reconsidered. If we're going to derive any benefit from the Economic Survey, we've got to believe the lesson that it teaches: there's something wrong with our present recommended fee schedule and the use of it. This also is going to have a high priority.

I look forward to this year with some trepidation. I've seen what a demand it has made on Billy. It's rather awesome to consider some of the problems that are facing us and some that we don't even yet expect, but we know that they're going to arise. I look forward to it

with a great deal of anticipation because of the opportunity it provides to associate with some very, very fine people, people who give a great deal of valuable and expensive time for the benefit of their fellow members in the Bar. On that note, I'll conclude my remarks. Thank you.

Hon. Tally D. Riddell of Quitman was elected President-elect of the Mississippi Bar Association.

The following commissioners were elected:

District 1—Fred M. Bush, Jr., Tupelo
District 2—Norman Breland, Gulfport
District 3—Gerald A. Gafford, Oxford
District 4—Fred C. Delong, Jr., Greenville
District 5—J. Dennis Dobbs, Ackerman
District 6—Graham H. Hicks, Natchez
District 7—Charles S. Wright, Jackson
District 8—Tom S. Lee, Forrest
District 9—Wren C. Way, Vicksburg
District 10—Joe Clay Hamilton, Meridian
District 11—Lomax B. Lamb, Marks
District 12—James F. McKenzie, Hattiesburg
District 13—Mrs. Aleita M. Sullivan, Mendenhall
District 14—R. Pearce Phillips, Brookhaven
District 15—Jack A. Morris, Monticello
District 16—J. Wilmot Thomson, Jr., Starkville
District 17—George P. Cossar, Charleston
District 18—Lunsford Casey, Laurel
District 19—Frank J. Hammond, Moss Point
District 20—Mrs. Mary Libby Payne, Jackson

At this time the Sixty-sixth Annual Convention of the Mississippi State Bar Association was adjourned sine die.

The following is a list of past presidents of the Mississippi State Bar:

1905—G. H. Shands (deceased)
1906—Murray F. Smith (deceased)
1907—C. H. Alexander (deceased)
1908—J. S. Sexton (deceased)
1909—T. H. Somerville (deceased)
1910—W. H. Powell (deceased)
1911—A. F. Fox (deceased)

1912—R. N. Miller (deceased)
1913—Robert B. Mayes (deceased)
1914—Sydney Smith (deceased)
1915—R. B. Campbell (deceased)
1916—A. T. Stovall (deceased)
1917—A. A. Armistead (deceased)
1918—S. E. Travis (deceased)
1919—J. B. Harris (deceased)
1920—Gabe Jacobson (deceased)
1921—Geo. J. Leftwich (deceased)
1922—J. B. Holden (deceased)
1923—R. H. Thompson (deceased)
1924—Stone Deavours (deceased)
1925—J. N. Flowers (deceased)
1926—D. W. Houston (deceased)
1927—R. E. Wilbourn (deceased)
1928—George W. Currie
1929—T. C. Kimbrough (deceased)
1930—George H. Butler (deceased)
1931—W. W. Venable (deceased)
1932—Jeff Truly (deceased)
1933—J. H. Price (deceased)
1934—W. Calvin Wells (deceased)
1935—Frank E. Everett (deceased)
1936—David E. Crawley (deceased)
1937—Marion W. Reily (deceased)
1938—R. M. Kelly (deceased)
1939—W. H. Watkins (deceased)
1940—W. E. Morse
1941—Alexander Currie (deceased)
1942—Charles F. Engle (deceased)
1943—Ross R. Barnett
1944—Bidwell Adam
1945—Earle L. Wingo (deceased)
1946—R. C. Stovall
1947—Stokes V. Robertson, Sr., (deceased)
1948—Phil Stone (deceased)
1949—Robert W. Thompson, Jr.
1950—Gibson W. Witherspoon
1951—Quitman Ross
1952—Charles B. Snow (deceased)
1953—Jerome S. Hafter (deceased)
1954—Robert J. Farley
1955—John C. Satterfield
1956—M. M. Roberts
1957—W. S. Henley
1958—Breed O. Mounger
1959—Hugh N. Clayton
1960—David Cottrell, Jr.
1961—Sherwood W. Wise
1962—C. Sidney Carlton (deceased)

1963—Edward J. Currie (deceased)
1964—Earl T. Thomas
1965—Orma R. Smith
1966—John T. Armstrong
1967—N. W. Overstreet
1968—Chester Curtis
William J. Keady*
1969—Boyce Holloman
1970—William A. Bacon

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* Elected but became Federal District Judge before term of office began.

PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING OF THE

Junior Bar Section

Held in Biloxi, Mississippi, June 10, 1971

The General Assembly of the Junior Bar Section was called to order at 1:30 p.m. by Hon. Frank O. Crosthwait, Jr., President.

Hon. Charles Ray Davis gave the invocation.

President Crosthwait recognized Hon. Hugh N. Clayton, founder and first president of the Mississippi Junior Bar Association.

President-elect Joe Meadows, delegate to the ABA Convention, gave the following report:

ABA CONVENTION REPORT*

Joe Meadows

The 1970 Annual Meeting of the ABA was held in St. Louis last August at the home of one of our distinguished guests today, Mr. Dan Rabbitt. Our Section was well represented by Frank Crosthwait, Pat Scanlon, Brooke Ferris, Thad Cochran, Walker Waters, your speaker and James A. Becker. We had an interesting panel discussion during the convention on the role of the vigorous defense attorney in the courtroom. This panel included, among others, William Garrett, the attorney for the Black Panther Party, Judge Simon Ripkin, a former federal judge and attorney for Jacqueline Kennedy Onassis, William Kunstler, attorney for the Chicago Seven, and a representative from the Justice Department. Suffice it to say there were some conflicting thoughts and views presented by this panel. The highpoint of the program in St. Louis was probably the presentation of our Model Drug Abuse Program. David Ward, who has done so much work in this area, will be one of our speakers today and will certainly enlighten us more on this. The Mid-Year Meeting was held in Chicago in February. Again, our Young Lawyers Section was well represented by Frank Crosthwait, Pat Scanlon, Thad Cochran and your speaker. Some of the highpoints of the convention were a panel on prison reform, a government aid to promote education, a report on progress of our drug abuse committee, and a luncheon address by Mr. Buckston, the student body president of

* This address has been abridged by the editor.

Jackson (Mississippi) State College, and Mr. Morgan, student body president of Kent State University.

The prison reform panel included a former inmate of San Quentin, a U.S. Senator, a former Supreme Court Justice, a prison warden and a former governor. Mississippi's concern over prison reform is evident from our recent legislative session. The ABA's Young Lawyers Section is very active in this area, and I think we've all come to realize that the only way we can rehabilitate prisoners is to reform our prison system. Speaking on this, on June 23, Parchman will participate in a nationwide prison visitation program. The President of the Young Lawyers Section, Joe Mullen, will participate.

The discussion of government aid to education merely pointed up the vast difference of opinion, and if a satisfactory solution or a compromise exists, no one presented it.

We received a comprehensive report on our drug abuse program, a harbinger of what we have seen transpire during the past school year here in Mississippi. The program is sponsored by our Young Lawyers Section, and I certainly would like to encourage you not to pass up an opportunity to participate in this program next year.

It should be interesting for you to note that during the year 1969-70 seventy-eight percent of the new members of the ABA were young lawyers, and of the total membership today we constitute thirty-six percent. Lastly, you would have been extremely proud of President Frank Crosthwait. His excellent report on the Hurricane Camille legal assistance program was included in the minutes of the executive council that has gone out to all sections of the United States.

PRESIDENT'S REPORT*

Frank Crosthwait

Today the Young Lawyers Section concludes its 35th year of service and leadership to our State. It is with humility and grateful appreciation that I thank you for the distinct honor and privilege that you have afforded me this past year to serve as your President of our 800 member organization, which is the strongest, the most thoroughly organized, the best financed and the most effective section of its size anywhere in the nation. In presenting this report of the activities and work of our committees during this bar year, I am cognizant of the

* This address has been abridged by the editor.

fact that my work was made easier because of the leadership and the vision of my predecessors in office. At this time I would like to publicly acknowledge this debt of gratitude and recognize all of our past presidents who are here with us today.

The officers and board of directors who have served you this year have been dedicated and able attorneys who have always had as their primary objective the welfare of our section and its members. I would be remiss in my duties if I did not personally express to them my gratitude for their service and faithful attendance at our five meetings, particularly the one held in Indianola. These men are listed inside your program. It was my honor and privilege to have served with them this year.

Prior to assuming the presidency last summer, I sent out our questionnaires to our entire membership. The answers and comments that I received were beneficial, and as a result thirty-five committees have been actively engaged in bar activities this year with more than three hundred young lawyers serving on these committees. These committees have made valuable contributions to our Bar and to our State, and I am grateful to the chairmen and to the committee members for their interest, time, study, cooperative effort and splendid results.

You will hear today committee reports on Moot Court, Law Day USA, Young Lawyers Seminar, Law Enforcement, Pre-Law Education and from the Resolutions and By-Laws Committee. Also, part of our substantive program today deals with a report on our Drug Abuse presentation that is being promulgated throughout the schools of our State.

As you recall, last year our section won a first place award at the ABA Convention in St. Louis for the Emergency Legal Aid that we rendered the Gulf Coast following the Camille disaster. The work of this committee was so impressive that I was invited to attend the officers and directors meeting of the ABA Young Lawyers Section at Sugarbush Inn in Warren, Vermont, in October to give a report on behalf of our section. After presenting this report, I was requested to give the report again at the Mid-Year Meeting of the ABA in Chicago in February. This I considered an honor and a tribute to the tremendous accomplishments of our Bar. I hope that our Bar can further be recognized by means of a publication in the ABA Journal or Law Notes.

We requested and received a one thousand dollar increase in our budget this past year, bringing its total to six thousand dollars. This enabled us to defray some of the expenses of our committees that had been active in the past, but had been unable to fulfill all of their

obligations and objectives because of the travel and incidental expenses involved. Pat Scanlon and I sat this year as members of the Officers and Board of Bar Commissioners and participated in important decision-making processes of the Bar. I am more convinced than ever of the important role that we, as young lawyers, play in our Bar programs and activities. As continuing evidence of this, Les Sumners, President-Elect of the State Bar, has requested the Young Lawyers to assume the responsibility for public relations during this Bar year, and we have gladly accepted that task. Further, the proposed amendment relating to the election of President-Elect of the Mississippi State Bar provides for a nominating committee composed of all past presidents of the State Bar. As a tribute to the Young Lawyers Section, this nominating committee will also include the two immediate past presidents of the Young Lawyers Section. I hope that our efforts this year have again reflected our leadership and service as young lawyers, not only to our community, but to our State as well, while improving the image of the attorney.

In closing, may I challenge each of you to continue to play an active role in the progress of our profession and its efforts in meeting public needs. Under the leadership of Joe Meadows and the two fine nominees for President-Elect, our Young Lawyers Section can serve as the vehicle to accept and meet this challenge.

ADDRESS BY THE CO-CHAIRMEN OF THE MISSISSIPPI DRUG ABUSE PROGRAM*

Thad Cochran

Briggs Smith

Briggs Smith has this year served as Vice-Chairman of our Drug Abuse Committee and Frank Crosthwait appointed me as the Chairman, State Chairman, of the ABA Young Lawyers Drug Abuse Program. We were fortunate in being able to attend the Mid-Year Meeting of the American Bar Association in Chicago, where we met David Ward and Al Breniky from Iowa, who were serving as co-chairmen this year of the ABA's program. Mr. Ward knows probably more about the drug abuse education effort than anybody else in the Young Lawyers Section of the ABA, because it was in Tampa, Florida, where this particular program was begun, and Dave was very active in organizing

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* This address has been abridged by the editor.

this effort. As a matter-of-fact, the type program that they presented in Florida was adopted as the ABA program, and David Ward wrote the operational handbook which was distributed to all the Young Lawyers state chairmen throughout the United States and was used as a guideline this year in putting on these programs. In addition, it was because of his individual efforts that this program became a nationwide effort, and it was due in a large part to his and Tom Cochran's foresight in gaining the endorsement of President Nixon to the program.

In Mississippi, specifically, after we were appointed, the vice-chairmen prepared a summary of the state laws concerning illegal drug usage-criminal laws. This summary was distributed to county chairmen who were appointed in the various counties to actually conduct the programs. Ideally, the program consists of a young lawyer explaining to the students at the junior high level the criminal consequences of illegal drug use. A physician is also a part of the program, whose job it was to explain the medical aspects of drug usage, and this included drugs from glue to heroin. In addition, through the efforts of Frank Crosthwait, we were able to purchase a film entitled "Marijuana," recommended as the best film for this age group, and we used this in connection with the lawyer and the physician. The program consists, ideally, of three classroom sessions. The lawyer and doctor are present at these sessions to deliver their remarks and also to answer questions that the students might have. It was very interesting to see that in the schools where we did put on these programs the students were quite interested and asked many questions, far too many to be answered in the time that we had allotted. Later, Briggs Smith is going to give you some firsthand information on experiences gained in putting on these programs.

We had a committee which was appointed by the President, Frank Crosthwait, and the committee members served as regional chairmen. We divided the State up into several regions, and gave these regional chairmen responsibility specifically for the counties within their regions. These chairmen were Donald Brock, Greenwood; Jason Floyd, Jr., Gulfport; Bob Hammel, Meridian; Tom Hardy, Columbus; Roger Megehee, Jackson; Lawrence Mellon, Cleveland; and John Allen Morris, Hattiesburg. These regional chairmen appointed some forty-seven county chairmen throughout the State, who then in turn began participating in a drug abuse education program in their respective counties. Our reports from regional chairmen and county chairmen show that we presented this program to some 10,000 eighth grade students, and some in other grade levels, this year. We were a little late in getting started

and actually putting on these programs, because of the work that we had to do in organizing the State, securing the film, preparing the summary of drug abuse laws and distributing the ABA Operational Handbook to the people who were involved. Because of the excellent response received from the approximately seventy young Mississippi lawyers, we think the year has been quite successful. In addition to just putting on the programs in the schools, many of our county chairmen participated in radio programs, television panels, and made speeches to civic clubs concerning our efforts in this area.

We think it's been a marvelous public relations effort this year and has attracted a great deal of favorable comment from people throughout the State. In addition to this, we gained the endorsement of our program from Dr. Garvin Johnston, State Superintendent of Education, who sent a memorandum to each District Superintendent throughout Mississippi, encouraging cooperation with our young lawyers who were presenting these programs in the schools. We also testified before a House Committee which was considering a drug abuse education bill, to advise what the Young Lawyers in Mississippi were voluntarily doing in this field. Although there was no meaningful drug abuse education bill passed this year by the Legislature, we think that through the efforts of these young lawyers and through the efforts of many other civic organizations there will be created a Drug Abuse Department in the State Department of Education, or some other suitable agency to supervise the education of the youth of Mississippi, not only at the junior high level, which is the area where we were concentrating, but in the grammar schools as well. We were also very pleased to be invited to address a National Convention of the Junior Auxiliaries, and as a result of that work shop we have now seen the effects that women can have in a program of this sort.

I will present to you just a few suggestions, if you should be called on to present one of these programs to the high school, on the manner in which I've found it's best to proceed. First of all, I think it's important to point out that we had a federal grant of $166,000 which will cause some of you to realize that it's not necessary that all of these expenses come out of your pocket. I don't want you to think that if you're called on to help that you'll have to foot all the bills. We would be able to reimburse you for parts of it, as those of you know who have been appointed as either county or regional chairmen. We presented a program in Batesville. We learned from it. After you present your first program you will learn so that you can present the programs that follow in much better fashion.

Initially, ask for literature. We have means available to provide literature that we think will help you in presenting this program. For instance, we can give you a summary of the law and a statement made by one of the doctors at the Chicago Seminar. Second, we suggest you choose young committee representatives to present the program because they will probably be in a better position to communicate with the students. You know the program is designed for the eighth grade, and therefore if you get a young lawyer or a doctor to help you present the program, we feel that you will get the point across to them in a better fashion. It's an opportunity to get to the students directly by the use of the young, professional men in the community.

Another facet that we found to be very helpful was the sending out of requests to the teachers asking that they let the students submit questions to the panel before they come to give the program. We found this to be helpful because it gave us an opportunity to answer the questions that they had asked, to give to them those answers that we thought were the questions that were most important to them. It lets you know where the pulse beat of the young people is in a situation such as this. Also, you should be sure to get the school's cooperation. The superintendent can help more than anyone else to be sure that the proper grades are present. If the eighth grade cannot attend, then you should amend your program and present it to the 10th and 11th grades. The program is flexible. If you cannot present the film, then don't let this stand in the way of presenting the program. If you cannot present the program in two or three segments, do not let this stand in your way. We presented our program in an hour and a half. We found that by reserving the last thirty minutes for questions, the students were still interested and they appreciated the presentation. If you are called upon to present the program, first contact the particular school involved; school officials are usually most helpful in coordinating school facilities and schedules to accomodate our speakers.

The reason the program has been as successful as it has in my opinion, is that the program does not try to moralize with these young people. It only tries to present the facts, and then it lets them make the decisions and, as you know, the young people seem to appreciate this type of approach. Therefore, if you contact a doctor, or should you be a lawyer that's chosen to make this presentation, consider the things I've tried to give to you today. They were helpful to me. I think they will be helpful to you, and remember that your committee is here to help you implement your program.

INCOMING PRESIDENT'S REMARKS*

Joseph R. Meadows

First of all, I would like to express my gratitude for this very high honor and privilege that you have given me, the very high honor of serving as President of our Young Lawyers Section for the coming year, and for the privilege of working with you as we seek to better our profession and our community. I have given a great deal of thought as to what an incoming president of a young lawyers section should say. Not possessing the intellectual capacity, nor really having the inclinations to do so, I have determined to avoid any attempt at any long winded discourse on the great and wonderful things we'll do this year. During the next few moments I would like to share with you some of my thoughts concerning a question that goes to the very heart of the Young Lawyers Section of the Mississippi Bar: How relevant is our section to the needs of our profession and our community? To put it another way, why have a young lawyers section?

First of all, I'd like to report to you that our section is alive and well. It is alive and well very simply because of your interest and desire to make it so. It is alive and well because men like Frank Crosthwait, the committees, the committee members, the board of directors and the local associations have all determined to keep it this way. It's alive and well because it is relevant, and why is this so? Because in 1969, within days after Hurricane Camille struck the Gulf Coast, under the leadership of Pat Scanlon, other members of the junior bar and our senior bar, you came at your own expense to assist us. You recovered over a million dollars for the people of the Gulf Coast, your fellow Mississippians, at no expense to them. Your efforts saved them over a hundred thousand dollars in legal fees. You helped your community when it needed it most.

For the past three years, hundreds of you, have been willing to give of your time and your effort by going into the high schools of the State of Mississippi and speaking about Law Day, what it means to us, and how we can make this a better State and nation, under the rule of law. By so doing, additionally, you have helped your profession. You have demonstrated to those students what is right, good and honorable about it, because you have been willing to serve on committees, such as the Mental Health Committee, which at the request of the State Mental Health Committee and the local chapters, sought legislative change in our archaic commitment procedures to the mental institutions. They

*This address has been abridged by the editor.

almost made it this time, and I am convinced they will next time. Each year you're willing to sponsor a seminar for new law graduates, to assist them in becoming oriented to the practice of law, to avoid some of the frustrations that you and I may well have experienced.

Because annually local groups, like the Jackson Junior Bar, sponsor an institute, with the sole purpose being to assist Mississippi lawyers, both young and old, to become better attorneys, so that they may better serve their clients and their community. You were and are willing to participate in a state-wide drug abuse program sponsored by our section, which hopefully will save untold numbers of our young people from the horrors of drugs.

So why have a Young Lawyers Section . . . . why help a ravaged Mississippi Gulf Coast after Camille . . . . speak in high schools on Law Day . . . . seek more humane commitment procedure for those who, through no fault of their own, are ill . . . . try to make the transition from law student to lawyer easier . . . . have institutes and seminars to broaden and enrich our profession . . . . attempt to save some teenager from the horrors of drugs? I think you know the answer. I once read that it was a sorry man indeed who could not afford to give some of his time to the betterment of his profession, and I challenge each of you to give a portion of your time for the betterment of your profession, to help keep the Young Lawyers Section alive and well, relevant to our professional needs and those of the community. Why have a Young Lawyers Section? I say we can ill afford not to. Thank you. I encourage each of you to stay.

Hon. W. Thad Cochran of Jackson was elected President-elect of the Mississippi Junior Bar.

The following named persons were elected to the board of Directors:

SOUTHERN DISTRICT:

Len Blackwell, Gulfport
Roy Williams, Pascagoula
Tom Stennis, Gulfport

CENTRAL DISTRICT:

Jim Creekmore, Jackson
Lanny Teller, Vicksburg
Edward Ellington, Jackson

NORTHERN DISTRICT:
Champ Terney, Indianola
Allen Pepper, Cleveland
Briggs Smith, Batesville

The annual convention of the Mississippi Junior Bar Association then adjourned.

The following is a list of past presidents of the Junior Bar Section:

1936—Hugh N. Clayton
1937—Jesse Graham (deceased)
1938—John C. Satterfield
1939—Charles A. Sisson
1940—George M. Ethridge, Jr.
1941—J. Morgan Stevens (deceased)
1942—Frank Everett, Jr.
1943—Richard E. Stratton, III
1944—Paul Parr (deceased)
1945—John W. Wade
1946—William N. Ethridge, Jr.
1947—James S. Eaton
1948—George Woodliff
1949—W. Arlington Jones
1950—E. Cage Brewer, Jr. (deceased)
1951—Kenneth Franks
1952—Robert G. Nichols, Jr.
1953—Lampkin H. Butts
1954—Joshua Morse, III
1955—Charles B. Henley
1956—George Morse
1957—Jack Travis
1958—K. Hayes Callicutt
1959—James F. Noble, Jr.
1960—Eaton A. Lang, Jr.
1961—E. C. Ward
1962—Frank A. Riley
1963—George P. Hewes, III
1964—Sherman Muths, Jr.
1965—B. B. McClendon, Jr.
1966—Edward P. Connell
1967—Robert Barnett
1968—Raymond Brown
1969—Pat H. Scanlon
1970—Frank O. Crosthwait, Jr.

STUDENT COMMENTS

ABSOLUTE LIABILITY IN MISSISSIPPI UNDER THE THEORY OF NUISANCE

I. Introduction

The past decade has seen an increased awareness of the need for effective legal control of the environment. This awareness is reflected in extensive federal and state legislation designed to protect the public interest from the polluter.[1] The new statutes promise much, but the administrative process employed under the statutes in dealing with the polluters has been criticized as being rife with burdensome procedures[2] to which the public remains an outsider and not a central player.[3]

The law of private nuisance, which has traditionally imposed liability for unreasonable interferences with property rights, appears at first blush to be a potent weapon in the pollution fight. This is especially true in light of the flexible nature of "reasonableness," the basis of the law of nuisance, which is no more than a society's attitude at a given time toward any form of conduct. There is little doubt that with the present emphasis on the quality of the environment, many long tolerated forms of pollution have come to be regarded as unreasonable. It would seem to follow, therefore, that continued public concern in ecological matters will broaden the scope of nuisance law. This comment will consider the state of the law of private nuisance in Mississippi, the theory upon which liability is predicated and the requisites for a cause of action.

II. General Principles

> *A private nuisance was orginally defined as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.*[4]

The law of nuisance is based on the maxim, *sic utere tuo ut alienum non laedas*, that one should use his property so as not to injure that of another.[5] While the law of nuisance is divided into two broad areas, public and private nuisances, the general term, "nuisance," encompasses many forms of conduct, and has been laboriously defined as "anything

[1] 42 U.S.C. § 1857 *et seq.* (1964); 33 U.S.C. § 466 *et seq.* (1964); Miss. Code Ann. §§ 7106-111 to -136 (Supp. 1968).

[2] J. Sax, Defending the Environment 62 (1971).

[3] *Id.* at 60.

[4] Southland Co. v. Aaron, 221 Miss. 59, 73, 72 So. 2d 161, 166 (1954), *citing* 3 Bl. Comm. 216.

[5] J. Joyce, Nuisances § 27 (1906).

that works or causes injury, damage, hurt, inconvenience, annoyance or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property; or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortious or unwarranted, and which injures, endangers or damages one in an essential or material degree in, or which materially interferes with, his legitimate rights to the enjoyment of life, health, comfort, or property, real or personal."[6] The distinction between public and private nuisances does not turn on the nature of the harm suffered, rather it is the nature of the right affected which determines whether a public or private action will lie.[7] A public or "common" nuisance is an offense against the public which is punishable as a crime.[8] A private nuisance, however, affects an individual or a determinate number of persons in the enjoyment of some private right not common to the public,[9] and traditionally involves an interference with the use and enjoyment of land.[10] As a general rule, not every inconvenience resulting from another's use of his own property is actionable; the use of the land resulting in the harm must be unreasonable[11] and the harm suffered must be material.[12] The requirements of unreasonable use and material harm as prerequisites to liability in nuisance are logical since the right of any person to use his property in a reasonable manner is no less important than that which his neighbor has to use and enjoy his property free from unreasonable interferences.[13]

Therefore, in most cases, the determination of the "reasonableness" of the defendant's activity is the essential element. Although some general considerations which are useful in determining what constitutes an unreasonable use of land have been listed,[14] there does not appear to be a formula that applies in all cases. The Mississippi Supreme Court has stated:

> The law of private nuisances is a law of degree, and usually turns on a question of fact, whether the use is unreasonable or

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[6] *Id.* § 2.

[7] *Id.* § 14.

[8] 1 F. HARPER & F. JAMES, TORTS § 1.23 (1956); *see also* Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950) (operation of motion picture theatre in violation of Sunday closing law); State v. Myers, 244 Miss. 778, 146 So. 2d 334 (1962) (possession of gambling devices); MISS. CODE ANN. § 1060 (1956) (statutory definition of public nuisance).

[9] J. JOYCE, NUISANCES § 8 (1906).

[10] W. PROSSER, TORTS 591 (4th ed. 1971).

[11] Blue v. Charles F. Hayes & Associates, Inc., 215 So. 2d 426, 428 (Miss. 1968).

[12] Laurel Equip. Co. v. Matthews, 218 Miss. 718, 721, 67 So. 2d 258, 260 (1953).

[13] W. PROSSER, TORTS 596 (4th ed. 1971).

[14] RESTATEMENT OF TORTS § 827 (1939); W. PROSSER, TORTS 597-99 (4th ed. 1971).

> not, under all the circumstances. There is no hard and fast controlling rule; for the use under one set of facts might be reasonable, and unreasonable under another . . . . Which facts are often many and varied such as location, nature of the use, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health and property and the like.[15]

The standard of the reasonableness of the use to which the defendant's property is put is whether the average man residing in the locality would view the harm suffered by the plaintiff as a substantial discomfort or inconvenience.[16] In Mississippi, the action may be filed at law for damages, or in the case of a continuing annoyance, when the injury is manifest, in Chancery,[17] where the plaintiff may avail himself of injunctive relief to completely halt the defendant's unreasonable activity or permit continued operations subject to conditions which will terminate the unreasonable interference.[18]

It seems clear that a plaintiff who is a lawful possessor of land has standing to sue,[19] and a good cause of action is made out when the use to which the defendant's land is put, considering all the circumstances, is unreasonable, and that use proximately causes the plaintiff some material injury.

In some cases, especially pollution type nuisances, a problem has frequently arisen when the conduct of the defendant has affected a large number of persons. When the character of the nuisance is public, the private litigant will not recover unless he can demonstrate that he has suffered some "special" or distinct injury.

III. Special Injury[20]

It is well settled, that a private individual may obtain an in-

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[15] Reber v. Illinois Cent. R.R., 161 Miss. 885, 898, 138 So. 2d 574, 577 (1932).

[16] J. Salmond, Torts § 73 (11th ed. 1953).

[17] Learned v. Hunt, 63 Miss. 373 (1885).

> The jurisdiction of courts of equity over the subject matter is, however, not an original jurisdiction. This power was formerly exercised very sparingly, only in extreme cases, at least not until after the right and question of nuisance had been settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still substantial agreement among the authorities that to entitle a party to equitable relief before resorting to a court of equity his case must be free and clear from all substantial doubt as to his right to relief.

J. Joyce, Nuisances § 416 (1906).

[18] Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 139 So. 2d 632 (1962).

[19] Reber v. Illinois Cent. R.R., 161 Miss. at 900, 138 So. at 577.

[20] *See* Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966).

> *junction to prevent a public mischief, by which he is affected in common with others.*[21]

As a general proposition, if a nuisance is public in nature the private citizen has no cause of action until he shows that a private nuisance exists as to him, and that he suffers some special and definite harm therefrom.[22] The rationale behind the rule was set forth in *State ex rel. Maples v. Quinn*:[23]

> These are termed common nuisances, and are distinct from private nuisances, inasmuch as they annoy the whole community in general, and not merely some particular person, and therefore are indictable only and not actionable, for it would be unreasonable to multiply suits by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects.[24]

In the case of certain activities which are normally considered to be public nuisances and ordinarily involve no particular damage to any individual citizen, the rule appears to be valid and well grounded. Examples of such nuisances would be the obstruction of a highway, illegal sale of liquor or maintenance of a house of prostitution. In such cases it would certainly be unreasonable to permit wholesale litigation against the person maintaining the nuisance by ordinary citizens whose only grievance is indignation or slight inconvenience.

In the case of a pollution nuisance, however, which results in actual material injury to many persons in the use and enjoyment of their property, the requirement of special injury does not logically exist. It must be remembered that the determination of whether a nuisance is public or private does not turn on the number of persons affected,[25] but on the character of the right invaded. When material damage has been done to private property it is hardly equitable to permit the defendant to interpose as a defense that he has inflicted a similar injury on everyone in the community and therefore is not liable to anyone since it would be unfair for those he has harmed to seek recovery in private lawsuits. The fallacy of the special damage requirement in such cases was pointed out in a California decision:[26]

> But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes so merged in the public

[21] Whitfield v. Rogers, 26 Miss. (4 Cushm.) 84, 59 Am. Dec. 244 (1853).

[22] 1 F. HARPER & F. JAMES, TORTS § 1.23 (1956).

[23] 217 Miss. 567, 64 So. 2d 711 (1953).

[24] *Id.* at 570, 64 So. 2d at 712, *quoting* Blackstone's Commentaries by Bernard C. Cavill, Public Wrongs at 822.

[25] J. JOYCE, NUISANCES § 5 (1906).

[26] Fisher v. Zumwalt, 128 Cal. 493, 61 P. 82 (1900).

> wrong, so as to take away from the persons injured the right, which they would otherwise have, to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act. Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injuries to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of public prosecution; so that, in effect, a wrongdoer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such a place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.[27]

It appears that in many instances where a defendant has raised the issue of special injury for public nuisance the major premise is faulty because only a private nuisance is involved, which, while affecting a large number of persons, affects them only insofar as their individual rights are concerned.[28] In other cases where the general rights of citizens are clearly affected it has been shown that, "[n]otwithstanding some aberrations in a few early cases, particular damage (special injury) certainly does not mean damage peculiar, exclusive or unique to the plaintiff."[29]

What constitutes a sufficient special injury in Mississippi is not as clear-cut as might be desired. The problem was first discussed in *Whitfield v. Rogers*,[30] in which the complainant had sued to enjoin construction of a proposed mill-dam which would have resulted in the inundation of some of his land. The vice-chancellor directed that the issue of whether the mill-dam would operate as a private or public nuisance be tried in the circuit court. After a determination that the dam would constitute a public nuisance, the construction was perpetually enjoined.

On appeal, it was contended by the appellant that a private individual could not obtain equitable relief from a public nuisance unless he averred and proved some special injury. Although there was no such allegation in the complaint, the court found that a special injury was apparent:

> The bill states, that the health of the neighborhood would be greatly injured by the stagnation of water produced by the dam,

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[27] *Id.* at 494, 61 P. at 83.

[28] *See* Soap Corp. of America v. Reynolds, 178 F.2d 503 (5th Cir. 1949); Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 117 N.W.2d 322 (1962); Wade v. Campbell, 19 Cal. Rptr. 173 (1962).

[29] Prosser, *supra* note 20, at 1008.

[30] 26 Miss. (4 Cushm.) 84, 59 Am. Dec. 244 (1853).

> and it shows that the complainant's lands lay within a short distance of it.[31]

Special injury was also found in the damage to complainant's land and timber, apart from the general injury to the public health. In two other cases, *Green v. Lake*[32] and *Pearman v. Wiggins*,[33] the court took note of the requirement of special injury, but neither opinion spelled out what constituted a legally sufficient special injury, because in each instance the decision turned on other grounds.[34] *Pearman* may have contained a sufficient allegation. The nuisance in that case was the blocking of the public streets with machinery owned by the defendant. Complainant's injury resulted from the fact that the obstruction was adjacent to his place of business, causing him inconvenience in shipping and receiving freight and annoyed his customers. Here, there was a valid requirement for a special and distinct injury which the complainant in all probability fully satisfied. The nuisance was obviously public, equally affecting any citizen who might desire to use the street.

A sufficient showing of special injury was made in *Hodges v. Town of Drew*,[35] in which the court reversed a directed verdict for the defendant town which had been sued for permitting a municipal septic tank to fall into disrepair. Plaintiff had alleged great family discomfort and sickness from odors, and that laborers on his farm had refused to plant, cultivate or gather crops from the area around the tank. The court declared: "It is the law as contended by the town that it was incumbent on appellants to show some special and different damage not common to the general public. Appellants evidence if true established that fact."[36] Again it is questionable whether the facts showed a public nuisance; it would seem that the discomfort and annoyance

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[31] *Id.* at 87.

[32] 54 Miss. 540 (1877).

[33] 103 Miss. 4, 60 So. 1 (1912).

[34] In Green v. Lake, 54 Miss. 540 (1877), complainants sought to abate a steam engine powered grist mill situated inside city limits. The nuisance alleged consisted of noise and danger of sparks from the engine. Defendants demurred on several grounds, one of which being that the nuisance, if any, was public and that complainants had not suffered any injury different in kind from the public at large. The demurrer was sustained. The supreme court on appeal never ruled on the sufficiency of the special injury, rather the basis of the decision appears to be that complainants failed to show either irreparable harm or an inadequate remedy at law. In Pearman v. Wiggins, 103 Miss. 4, 60 So. 1 (1912), the sufficiency of an allegation of special injury was not considered on appeal. The decision had issued without a full evidentiary hearing since the defendant had denied the existence of the nuisance.

[35] 172 Miss. 668, 159 So. 298 (1935).

[36] *Id.* at 679-80, 159 So. at 300.

were personal to the few citizens in the area of the tank and that no general right of the public was involved. Furthermore, in *City of Meridian v. Tingle*,[37] where the plaintiff based his action on the theory that the dumping of sewage by the city into a creek that ran through his property constituted a public nuisance, the court agreed that the fact that plaintiff's livestock could not drink from the stream and that he was subjected to the obnoxious odors was an adequate special injury.

It would appear that *Whitfield, Hodges,* and *Tingle* are some authority for the proposition that any actual, material damage to private property caused by a genuine public nuisance should give the private plaintiff standing to sue. Such a result is particularly appealing for if actual damage is sustained, it is demonstrably equitable to permit the innocent, injured party to recover for the harm caused by a defendant's unreasonable activity. It seems that the issue will remain an open question until a line is drawn separating public nuisances from private nuisances involving many potential plaintiffs.

IV. Theory of Liability

No owner of property may set in motion agencies which physically invade the home of another without liability for the damage done.[38]

In an action for damages based on private nuisance, the Restatement of Torts holds that for an accidental invasion of another's interest in land there is no liability and that the tort of private nuisance includes intentional harms, and those harms caused by negligent, reckless or ultrahazardous conduct.[39] It is stated that the law has shifted from strict liability to a new liability for private nuisance based on conduct.[40] In order for the nuisance to be an intentional harm under the Restatement, the actor must act for the purpose of causing the invasion, or know that the invasion is resulting or is substantially certain to result from his conduct.[41] Strict liability is imposed only for invasions resulting from the ultrahazardous conduct of the actor.[42] The law of private nuisance in Mississippi is not akin to the principles as set forth in the Restatement.

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[37] 226 Miss. 317, 84 So. 2d 388 (1956).

[38] King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 486, 42 So. 204, 204-05 (1906).

[39] Restatement of Torts, introduction to ch. 40 at 220 (1939).

[40] *Id.* at 221.

[41] *Id.* § 825, comment a at 238.

[42] *Id.* § 822; ultrahazardous activity is defined in § 520:

An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage.

In *Blue v. Charles F. Hayes & Associates, Inc.*,[43] plaintiff's declaration alleged that the defendant, who owned the mineral rights under the plaintiff's land, had drilled an oil well and constructed a slush pit adjacent to it. The pit had been filled with salt water, drilling muds, lye and other contaminating matter. The declaration further alleged that the embankment of the pit collapsed, that the contents flowed over his land and that drilling oils and mud accumulated in his pasture. Plaintiff did not claim negligence; rather, his declaration expansively asserted, "We claim an invasion."[44] The defendant's demurrer to the declaration was sustained, but on appeal, the court was of the opinion that a cause of action was shown and that the demurrer should have been overruled.

> When one makes such a use of his own land so as to unreasonably interfere with the rights of his neighbors in the exercise of their lands, and when appreciable or actual damage is shown, he should be made to pay damages or cease such use.[45]

The problem presented in *Blue* was the determination of a theory upon which the plaintiff's action would lie. The court held that the suit could be instituted for nuisance or negligence in the digging of the well and pointed out the distinction between nuisance and trespass.[46] It further stated that in similar cases, oil drilling contractors had been liable on a "theory of nuisance"[47] and for negligence in the construction and maintenance of slush pits.[48]

What is this "theory of nuisance?" Normally nuisance is not considered to be a type of tortious conduct; rather, it is a field of tort liability which refers to the interest invaded and not to the kind of act or omission that has led to the invasion.[49] If we assume, however,

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[43] 215 So. 2d 426 (Miss. 1968).

[44] *Id.* at 428.

[45] *Id.*

[46] *Id.* at 429, *quoting* 39 AM. JUR. NUISANCES § 3 (1942):

> The difference is that a nuisance consists of the use of one's own property in such a manner as to cause injury to the property or other right or interest of another and generally results from the commission of an act beyond the limits of the property affected, while a trespass is a direct infringement of another's right of property. Thus where there is no actual physical invasion of the plaintiff's property, the cause of action is for nuisance rather than trespass.

[47] Love Petroleum Co. v. Jones, 205 So. 2d 274 (Miss. 1967); Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963); Southland Co. v. Aaron, 224 Miss. 780, 80 So. 2d 823 (1955); Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161, 49 A.L.R. 2d 243 (1954).

[48] Dapsco, Inc. v. Reynolds, 254 Miss. 111, 180 So. 2d 319 (1965); Jett Drilling Co. v. Jones, 251 Miss. 332, 169 So. 2d 463 (1964); Broadhead v. Gatlin, 243 Miss. 386, 137 So. 2d 909 (1962); Magnolia Petroleum Co. v. Stinson, 230 Miss. 533, 93 So. 2d 815 (1957); Gulf Refining Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955); Larco Drilling Corp. v. Lee, 207 So. 2d 634 (Miss. 1968).

[49] W. PROSSER, TORTS 573 (4th ed. 1971).

that the court was referring to nuisance as a brand of tortious conduct, then it would seem to be either intentional conduct or conduct falling within the realm of strict liability, since negligence was distinguished from nuisance as an alternative theory. A reexamination of the facts alleged in *Blue* discloses nothing that remotely resembles an intentional tort, therefore, strict liability remains to be considered.

The fact situation involved in most of the "slush pit" cases[50] is remarkably analogous to the situation involved in the famous English case of *Rylands v. Fletcher.*[51] In *Rylands,* plaintiffs had appealed a judgment for the defendants to the Exchequer Chamber. In reversing the earlier judgment the court stated:

> We think the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.[52]

The opinion went on to state that this was a proper allocation of liability since it would be unreasonable to place the loss on the innocent neighbor when the actor has brought the harmful agency onto his own property knowing that it could cause damage on escape. This was proclaimed to be the law whether the agencies brought onto the land, "be beasts, or water, or filth, or stenches."[53] On further appeal to the House of Lords where the decision and rule of law set out by the Exchequer Chamber was affirmed, Lord Cairns supposedly qualified the rule by drawing a distinction between natural and non-natural uses of the land by defendants.[54]

From a reading of the private nuisance cases in Mississippi it would seem that if the word "unreasonable" is substituted for the word "non-natural" in Lord Cairns opinion, the "theory of nuisance" referred to by the Mississippi Supreme Court in *Blue* is in reality a doctrine of strict liability whose pedigree is inexorably linked to *Rylands v. Fletcher.*

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[50] Cases cited notes 47, 48 *supra.*

[51] L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868); defendants had constructed a reservoir above some ancient coal workings which had connected to tunnels in plaintiffs' coal mine. During excavation the defendants' engineers encountered the old shafts which were filled with earth, but continued the work without taking precautions. When the reservoir was filled the shafts gave way, and water was forced through them into plaintiff's mine.

[52] L.R. 1 Ex. at 280.

[53] *Id.*

[54] L.R. 3 H.L. at 339.

In *Love Petroleum Co. v. Jones*,[55] the plaintiffs sued for damages to real estate occasioned by the escape of oil and salt water from the defendant's oil well. In affirming a verdict for plaintiff the court stated:

> [T]o permit salt water and oil to escape upon the lands of another creates a nuisance for which a landowner is entitled to at least nominal damages. . . .[56]

The same result was reached in *Central Oil Co. v. Shows*;[57] the court determined that the allegations in the declaration of negligence in leaving a slushpit filled with caustic soda which subsequently escaped onto the adjoining lands of the plaintiff was a sufficient allegation of nuisance to permit recovery of at least nominal damages.[58] The recognition of a right to nominal damages clearly indicates the intent of the court to make the creater of the nuisance liable beyond the traditional liability for "material" interferences only.

Plaintiffs in *Southland Co. v. Aaron*[59] alleged that defendant and its employees had negligently discharged poisonous and deleterious refuse into a creek which ultimately flowed onto their lands causing injury. After a verdict for plaintiffs, the defendant appealed on the grounds that negligence was not proved. The court determined, however, that negligence was not the gravamen of the action and that the real injury complained of was the operation of the defendant's refinery so as to constitute a nuisance.

> The gravamen of plaintiffs' action rests on the maxim *'Sic utere tuo ut alienum non laedas.'* Negligence, as alleged in the plaintiffs' declaration is used in the broad sense of lack of due care in the use of the defendant's property to avoid injury to the plaintiffs' property.[60]

Since negligence ordinarily need not be alleged or proved in nuisance cases, the averments of negligence were treated as surplusage.[61]

In *Laurel Equip. Co. v. Matthews*,[62] suit was brought to recover damages for injury to vegetables and shrubbery and for obnoxious odors caused by the negligent distribution of paint onto plaintiffs'

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[55] 205 So. 2d 274 (Miss. 1967).

[56] *Id.* at 275.

[57] 246 Miss. 300, 149 So. 2d 306 (1963).

[58] *Id.* at 310, 149 So. 2d at 311, citing 39 AM. JUR. NUISANCES § 142 (1942), "It (the declaration) must show the existence of a nuisance, but it is not necessary to use the word 'nuisance' if the facts alleged disclose a nuisance."

[59] 221 Miss. 59, 72 So. 2d 161, 49 A.L.R.2d 243 (1954).

[60] *Id.* at 73, 72 So. 2d at 166, 49 A.L.R.2d at 250.

[61] *Id.* at 74, 72 So. 2d at 166, 49 A.L.R.2d at 250-1 citing 66 C.J.S. NUISANCES § 11c (1950).

[62] 218 Miss. 718, 67 So. 2d 258 (1953).

property, which was adjacent to defendant's place of business. The jury returned a verdict for acutal and punitive damages. On appeal, the court said that the sole issue was whether or not the defendant negligently operated its paint shop and thereby prevented the plaintiffs from enjoying the peaceful occupancy and habitation of their home and premises. Plaintiffs' evidence had shown that paint came onto their land from the spraying operations conducted at the plant, and defendant's evidence was to the effect that no substantial amount of paint was lost. Under those circumstances the court held that the determination of the issue had been properly for the jury. There was authority for the plaintiffs' right to recover damages:

> A reasonable use of one's property can never be construed to include those uses which produce noxious smells and result in material injury to the comfort of the owner of the adjacent property and his family. Thus a business, although in itself lawful, which impregnates the atmosphere with disagreeable or offensive odors or stenches may become a nuisance to those occupying adjacent property, in case it is so near, and the atmosphere is contaminated to such an extent as substantially to impair the comfort or enjoyment of such adjacent occupants."[63]

The lower court decision was affirmed as to the actual damages, but on the issue of punitive damages the judgment was reversed, the plaintiff having failed to show either a willful and intentional wrong or gross negligence.[64] Again, the facts of the case and the language of the court indicate that the gravamen of the suit was nuisance. For that reason, the references to "negligence" in the opinion are unclear unless the word is used in the broad sense of *Southland,* indicating lack of due care.

The "theory of nuisance" is well illustrated by the case of *Cochran v. Consumers' Wirebound Box Co.*,[65] where the plaintiff had sued for damages to his home, rental property and business establishments. The defendant had constructed an industrial incinerator to dispose of waste from its box and verneer factory, but burned sawdust and soot frequently emanated from the incinerator onto the plaintiff's property. Suit was brought in the circuit court which resulted in a jury verdict for the defendant, but on appeal the court reversed, holding that the plaintiff should have been granted a peremptory instruction as to liability. The evidence introduced by the plaintiff which showed that the discharge from the incinerator had produced considerable annoyance and discomfort was not contradicted. Rather, the substance of

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[63] *Id.* at 721, 67 So. 2d at 259-60 citing 39 AM. JUR. NUISANCES § 59 (1942).

[64] *Id.* at 723, 67 So. 2d at 260.

[65] 246 Miss. 398, 149 So. 2d 844 (1963).

defendant's witnesses' testimony was that the incinerator was efficient, modern, and that the company had to dispose of the waste in some way. The court was of the opinion that upon this uncontradicted evidence, the plaintiff was entitled to at least nominal damages.

From the cases, therefore, there is no support for the proposition that under the "theory of nuisance," liability is based on intentional interferences as outlined in the Restatement.[66] The cases consistently appear to turn on a factual determination of whether or not there was a substantial interference with the plaintiff's interests resulting from an unreasonable use by the defendant of his own land,[67] and if so, then liability will attach for all damages proximately caused by the nuisance. It appears, furthermore, that the traditional requirement that an interference be "substantial" is of dubious validity, since the Mississippi Supreme Court in *Jones, Shows,* and *Cochran* held that nominal damages could be awarded. The Mississippi version of strict liability in nuisance, recognized in practice, if not in name, is apparently based on a very high regard for the inviolability of private property rights. Strict liability in nuisance is not unique to Mississippi. Prosser has shown that liability for nuisance very often rests on the strict liability principles of *Rylands v. Fletcher,* requiring no showing of wrongful intent or negligence.[68] He has concluded: "That the Texas courts have accepted the doctrine and have applied it repeatedly under the name of 'nuisance' without fault."[69]

V. The Negligence Cases

In *Blue,* the supreme court made reference to cases where liability was based on negligence rather than the "theory of nuisance."[70] The factual situations of the cited cases are not distinguishable from the nuisance cases; they uniformly involve the "escape" of a substance, strikingly analogous to the circumstances of *Rylands v. Fletcher.*

In *Dapsco, Inc. v. Reynolds,*[71] suit was ostensibly predicated on the grounds of negligence. The plaintiff had sued for damage to timber,

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[66] Restatement of Torts, *supra* note 41.

[67] *See* Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 139 So. 2d 632 (1962); Cooper Tire & Rubber Co. v. Johnston, 234 Miss. 432, 106 So. 2d 889 (1958); City of Oxford v. Spears, 228 Miss. 433, 87 So. 2d 914 (1956); City of Meridian v. Tingle, 226 Miss. 317, So. 2d 388 (1956); Hodges v. Town of Drew, 172 Miss. 668, 159 So. 298 (1935); King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 42 So. 204 (1906); Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1892).

[68] Prosser, *Nuisance Without Fault,* 20 Texas L. Rev. 399, 426 (1942).

[69] *Id.*

[70] See cases cited in 48 *supra.*

[71] 254 Miss. 111, 180 So. 2d 319 (1965).

land, and livestock caused by the negligent maintenance and repair of a dam around defendant's slush pit. A jury verdict for plaintiff was reversed on appeal because of errors in the instructions. The court stated:

> There were issues of fact as to (1) whether Dapsco was the operator or company maintaining and repairing the slush pit and dam; and if so, (2) whether Dapsco was negligent in maintaining and repairing it.[72]

The plaintiff's instruction which stated that as a matter of law, the persons or corporations or firms operating the oil wells and slush pits were guilty of negligent operation of the slush pit that was shown to have overflowed was erroneously given. The court further held that it was error to refuse at least one of Dapsco's requested instructions which would have placed the burden of proving Dapsco's negligence on the plaintiff.

The reversal of the case for failure to prove negligence is puzzling, especially in light of *Southland*; the court could have easily concluded that the gravamen of the injury was nuisance and treated the allegations of negligence as surplusage. The elements of an actionable nuisance appear to have been clearly met and from a practical standpoint the instruction holding the defendant negligent as a matter of law is the same result that would have been reached under a suit based on the "theory of nuisance."

In *Jett Drilling Co. v. Jones*,[73] the basis of the suit was the negligence of the driller of an oil well which resulted in damage to plaintiff's lands when the contents of a slush pit spilled out. The decision of the lower court for the plaintiff was reversed because the evidence showed that the only defendant, the driller, had already departed the well site, having completed his operations prior to the time of the spill. The owner of the well was not named as a defendant, and presumably, the plaintiff would still have a good cause of action against him.

In *Broadhead v. Gatlin*,[74] liability in negligence arising out of a slush pit overflow was affirmed; the court said:

> Clearly, the appellants were guilty of negligence in leaving the slush pit with the potential poisons therein. They could reasonably foresee that the dam might break with such consequences as have been shown to result. Unquestionably, some damages resulted.[75]

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[72] *Id.* at 115, 180 So. 2d at 320.

[73] 251 Miss. 332, 169 So. 2d 463 (1964).

[74] 243 Miss. 386, 137 So. 2d 909 (1962).

[75] *Id.* at 390-91. 137 So. 2d at 911.

Likewise, *Magnolia Petroleum Co. v. Stinson*[76] is authority for recovery in negligence under facts that would allow recovery under the "theory of nuisance."

However, in *Larco Drilling Corp. v. Lee*,[77] the confusion between actions in nuisance and negligence is reflected. The supreme court held that the plaintiff, in his negligence action, had failed to show that the defendants, who owned the mineral estate under plaintiff's surface, had used more land than was reasonably necessary for the purpose of drilling the well or that the defendants were guilty of negligence in preparing the well site. It was noted, however, that there was evidence that some oily, muddy substance had run into a pond on the property and had killed some fish. There was no testimony to show the extent of the injury. Plaintiff's verdict for $2,500.00 was reversed, and following the decision in *Shows*,[78] judgment was entered for nominal damages in the sum of $50.00. Negligence or nuisance, the plaintiff failed to prove his damages, but since some harm was evident he recovered nominal damages. While the court held that the defendants had not used more land than was reasonably necessary to exploit their minerals, apparently the manner in which the defendants had used the land was unreasonable, resulting in the creation of a "technical nuisance" to the tune of fifty dollars.

VI. Ultrahazardous Activity Distinguished

The conduct involved in the cases decided under the "theory of nuisance" does not fit the definition of ultrahazardous activity as set forth in the restatement.[79] The Mississippi Supreme Court has permitted recovery of damages for injury to property resulting from blasting activity on a basis of strict liability indicating approval of the rule of *Rylands v. Fletcher*, at least insofar as that abnormally dangerous activity is concerned.[80] It is open to question whether the hazardous nature of the activity itself was sufficient to impose liability after damage resulted. This is especially true in light of *Cities Service Oil Co. v. Corley*,[81] where the trial court had permitted a recovery on the principle of strict liability when the owner of a surface estate's well went dry, allegedly the product of exploratory underground blasting

[76] 230 Miss. 533, 93 So. 2d 815 (1957).

[77] 207 So. 2d 634 (Miss. 1968).

[78] 246 Miss. 300, 149 So. 2d 306 (1963).

[79] Restatement of Torts, *supra* note 42.

[80] Central Exploration Co. v. Gray, 219 Miss. 757, 70 So. 2d 33 (1954), where the court held that no distinction would be drawn between injuries received from concussion and those received from debris thrown upon the land.

[81] 197 So. 2d 244 (Miss. 1967).

by the lessee of the mineral estate. The supreme court reversed on the grounds that the lessee had a right to conduct such operations as holder of the oil and gas lease and that plaintiff should have alleged negligence. Furthermore, it was noted that "[e]ven assuming appellant's operation did cause the alleged damage, appellant would not be absolutely liable if its operations were conducted in a careful and prudent manner."[82] But the court later held that in addition to negligence, the lessee could be held liable for an unreasonable use of the premises.[83] It would logically follow that the "unreasonable use" is a direct reference to strict liability in nuisance where negligence need not be proved. The implication is clear that if a holder of a mineral estate is conducting normal blasting operations incident to the exploitation of his minerals, the fact that it is an ultrahazardous activity will not automatically permit the plaintiff to rely on principles of strict liability, because under these circumstances blasting may very well be a "reasonable" activity. This case turned on the special relationship of the mineral estate lessee and his lessor, which presupposes the lessee's right to do what is reasonably necessary to extract minerals without liability for resulting damage.

The special relationship was involved in *Placid Oil Co. v. Byrd*,[84] which was brought on a nuisance theory. The court determined that the suit should have been brought for negligence.[85] There it was found that the defendant was conducting ordinary operations which were not "unreasonable"; therefore there was no possibility of recovery in nuisance from the outset. Likewise, in *Charles F. Hayes & Associates, Inc. v. Blue*,[86] a judgment for the plaintiff was reversed because nuisance was not proved and plaintiff had conceded that negligence was not involved. However, the application of this law to the particular facts in the case is of uncertain validity, since the appellee failed to file a brief on appeal, which was regarded as tantamount to a confession of error.[87]

From the cases it appears that the mere fact that an activity is regarded as ultrahazardous is insufficient per se to establish automatic absolute liability when injury results therefrom.

VII. Conclusion

From the foregoing, it is apparent that the law of private nuisance

[82] *Id.* at 246.

[83] *Id.* citing Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962).

[84] 217 So. 2d 17 (Miss. 1968).

[85] *Id.* at 18.

[86] 233 So. 2d 127 (Miss. 1970).

[87] *Id.* at 180.

in Mississippi constitutes an effective remedy for the protection of private property rights. In addition, the following conclusions may be drawn:

(1) That under the so called "theory of nuisance," the Mississippi Supreme Court has recognized recovery in nuisance based on principles of strict liability, requiring no proof that the nuisance has been intentionally or negligently created;

(2) That this liability will arise when the defendant makes an unreasonable use of his land which proximately results in actual injury to the plaintiff;

(3) That when the nuisance is in fact public in nature, the often noted requirement of special injury is sustained by a showing that the land, chattels or health of the plaintiff and his family has suffered actual injury;

(4) That the plaintiff is the master of his cause of action, and if he pleads negligence then his proof should conform to his allegations; he cannot depend on the court's recognition of the gravamen of his injury as nuisance.

The application of strict liability principles to nuisances seems just. It is unconscionable that an innocent person should have to bear the loss for injuries resulting from the unreasonable conduct of his neighbor, and if it can be proven that the act was unreasonable there seems to be no good reason why proof of negligence or intent should be required. Moreover, the "theory of nuisance" can be an important adjunct to the recent environmental legislation. The certainty of swift private litigation ought to be an effective deterrent to the industrial polluter as well as the unruly next door neighbor.

Lawrence D. Wade

AIRPORT: REMEDIES FOR THE ADJACENT LANDOWNERS

I. Introduction

One of the components of the transportation revolution has been the rapid expansion of the aviation industry which has developed almost entirely within the framework of the twentieth century. The solitary flight of the Wright brothers has been followed by astonishingly diversified applications of aviation for private, military, and commercial usage. Attendant with the growth of the industry has been the construction of large facilities to handle the heavy traffic of aircraft necessary to meet the public demand for the conveniences of air travel. Commercial aircraft have evolved from relatively small, propeller-driven craft to the large "jumbo-jets" employed by major airlines today. The nature of today's planes is such that their operation, and the operation of their ground facilities, is accompanied by an inordinate amount of noise and vibration. The operation of a jet-engine is characterized by a particularly disconcerting, high-pitched whine that is especially pronounced when an aircraft is in the process of landing or taking-off. The busy airports serving our cities witness a concentration of hundreds, even thousands, of such landings and take-offs daily. The location and operation of these extremely noisy facilities on property acquired by the airport operator and surrounded by property held by private owners has, not surprisingly, resulted in a clash between the public need for air transit and traditional concepts of property rights.[1]

II. Traditional Concept of Airspace Ownership

The traditional concept of property rights regarding airspace was that the landowner owned the adjacent column of air above that land to an infinite height.[2] Under such a concept of absolute ownership, the unauthorized passage of one aircraft at any altitude would constitute a technical trespass. The Supreme Court noted the persistence of such antiquated property concepts is unthinkable in the modern world.[3] Congress recognized the need for some modification of the private ownership doctrine of airspace and declared that the airspace above that altitude determined by the Secretary of Commerce to be the minimum for safe flight was to be designated as navigable

[1] Hill, *Liability for Aircraft Noise—The Aftermath of Causby and Griggs*, 19 U. Miami L. Rev. 1 (1964).

[2] United States v. Causby, 328 U.S. 256, 260 (1946).

[3] *Id.* at 261.

airspace and thus subject to the public right of free transit.[4] These minimum safe altitudes for flight were fixed at 1000 feet over built-up areas and 500 feet over less populated areas.[5] After this legislation, however, questions remained unanswered concerning the respective rights of the property owner and the aviator.[6] These questions were tied in with the search by landowners for some remedy by which they could protect themselves against the noise and vibrations associated with aircraft operating near their property. Remedies fashioned under the traditional concepts of property law proved inadequate to meet the grievances posed by the advent of the airplane.

> Actions seeking to enjoin flights over private property, as a nuisance, were denied on the ground that the annoyance or damage was nominal, that the operation of aircraft, or of airports, was not a nuisance per se, or that the statutory right of flight created a 'legalized nuisance' . . . . Similarly, an action for damages for trespass met the defenses that . . . the aircraft did not invade the subjacent owner's column of airspace, or that the flight was above the minimum altitude of navigable airspace.[7]

III. The *Causby* Remedy: "Inverse Condemnation."

The difficulty experienced by land owners in obtaining some remedy from the noise and vibrations of aircraft approaching and departing airports located near their property indicated that they would have to bear an inordinate burden of discomfort and inconvenience to enable the public to enjoy the benefits of air transportation. The Supreme Court, however, gave its approval to an adequate new remedy, under a new theory, in the leading case of *United States v. Causby*.[8] The new theory advanced by *Causby* was that low, continuous flights of aircraft which immediately and directly interfered with the use and enjoyment of land constituted a "taking" in the constitutional sense of an air easement over the property for which the owner was entitled to just compensation.[9] The holding in *Causby* was the first instance in which a landowner was provided with a remedy against aircraft overflights in the form of what is known as an "inverse condemnation" suit. Such suits are in the nature of eminent domain proceedings but are a reversal of the usual procedure in that the proceedings are initiated by the

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[4] Air Commerce Act of 1926, ch. 344, § 10, 44 Stat. 574, *as amended* ch. 601, § 1107 (h), 52 Stat. 1028 (1938).

[5] 14 C.F.R. § 60.17 (a), (b) (1962).

[6] Hill, *supra* note 1, at 13.

[7] *Id.* at 18.

[8] 328 U.S. 256 (1946).

[9] *Id.* at 266.

property owner instead of the governmental unit.[10] The rationale underlying the action is that since the property informally acquired for public use could have been the subject of an eminent domain action by the acquiring body, in which the owner would have been compensated, the owner is entitled to institute such an action after the *de facto* taking.[11]

The Court, in *Causby*, clarified questions about the extent of the landowner's property rights in the airspace above his property. Though the government argued that the landowner does not own any airspace he has not subjected to actual possession by the erection of buildings or by some other form of occupancy, the Court ruled that although the airspace was a public highway, the landowner must have exclusive control of the immediate reaches of the airspace above his property if he was to have the full enjoyment and use thereof.

> The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.[12]

The Court noted the fine distinction between governmental action that consequentially damages property and that action which constitutes a taking for a public purpose. While consequential damage is not compensable under the fifth amendment, the fact that property is not rendered totally valueless does not prevent the result of the action from being a compensable taking.[13]

> The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[14]

IV. Federal Aviation Act of 1958 and The *Griggs* Decision

The flights involved in *Causby* were not within the navigable airspace as defined by the Air Commerce Act of 1926;[15] therefore, when Congress redefined navigable airspace in the Federal Aviation Act of

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[10] 27 Am. Jur.2d *Eminent Domain* § 478 (1966).

[11] Note, *Eminent Domain-Rights and Remedies of An Uncompensated Landowner*, 1962 Wash. L.Q. 210, 232-33.

[12] United States v. Causby, 328 U.S. 256, 264 (1946).

[13] *Id.* at 262.

[14] *Id.*

[15] ch. 344, § 10, 44 Stat. 574, *as amended* ch. 601, § 1107 (h), 52 Stat. 1028 (1938).

1958[16] to include airspace needed for safe take-offs and landings,[17] the question arose as to what effect this action would have on the availability of the remedy afforded by *Causby*.

The case of *Griggs v. County of Allegheny*[18] presented the Supreme Court with its first opportunity to confront this specific question. The County of Allegheny owned and operated the Greater Pittsburg Airport on property it had bought. The airport was planned and constructed in conformity with regulations formulated by the Civil Aeronautics Administration under the scope of the National Airport Plan.[19] The County, pursuant to the Plan, entered into agreements with the Administrator of Civil Aeronautics in which it agreed to maintain a master plan of the airport which would include approach ways to the airport established by the Administrator, and the County agreed to acquire the necessary air easements involved in such approach ways. The master plan, including these approach ways, was submitted by the County and was approved. The approach way to the northeast runway passed over Griggs' home which was located 3,250 feet from the end of the runway, and the bottom of the approved glide path was 11.36 feet above the chimney of his house. No flights into or out of the airport were at lower altitudes than necessary for a safe landing or take-off, thus they clearly were within the navigable airspace under its broadened definition. Planes using the northeast runway for take-offs regularly passed between 30 feet to 300 feet over Griggs' home and while landing, they came as close as 53 feet to his roof. The noise associated with these operations was comparable "to that of a noisy factory."[20] Not surprisingly, this caused the occupants of Griggs' home to have difficulty in carrying on normal conversations in the house or over the telephone. Flights at night often prevented the occupants from sleeping even though they resorted to sleeping pills and ear plugs in a vain effort to co-exist with the noise.

Griggs initiated eminent domain proceedings and obtained a determination that the County had taken an air easement over his property and that he was entitled to compensation. The Pennsylvania Supreme Court reversed, holding that even if there had been a taking for a public use, the airlines or the United States, not the County, was liable for the compensation.[21] The United States Supreme Court, on certiorari, noted the broadened definition of navigable airspace, but

[16] 49 U.S.C. §§ 1301 *et seq.* (Supp. 1958).
[17] 49 U.S.C. § 1301 (24) (Supp. 1958).
[18] 369 U.S. 84 (1962).
[19] 49 U.S.C. §§ 1101 *et seq.* (1964).
[20] Griggs v. County of Allegheny, 369 U.S. 84, 87 (1962).
[21] Griggs v. County of Allegheny, 402 Pa. 411, 168 A.2d 123 (1961).

maintained that the *Causby* doctrine required a finding that a taking of an interest in that land had occurred and was compensable as such[22] if the operation of aircraft, even at authorized levels, resulted in interference with the use and enjoyment of land. The County contended as it had in the state court, that the taker was not itself, but either the airlines or the Civil Aeronautics Administration, which had approved the airport master plan and its operating procedures. The Court, however, ruled:

> [the county] which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.[23]

The Court maintained that the airport would be inoperable without the necessary approach areas and that the County, to provide for these areas, needed to acquire some private property; it concluded "that by constitutional standards it did not acquire enough."[24]

The Court, in *Griggs*, had approvingly cited the case of *Ackerman v. Port of Seattle*,[25] in which the Washington court had more fully considered the consequences of the broadened definition of navigable airspace. Property owners in *Ackerman* instituted a suit against the Port of Seattle, the operator of the Seattle-Tacoma International Airport to recover the diminution in the market value of their property caused by the operation of the airport, alleging that as many as 100 aircraft daily passed as low as 100 feet over their land. The Port, they claimed, although it possessed eminent domain power, had failed to acquire the property used as approach ways. Dealing with the question of a constitutional taking, the court rejected the argument that the Port took no interest in the property because all the flights involved were within the zone determined to be navigable airspace. The constitutional provision forbidding the taking of private property for a public purpose without just compensation was viewed as a limitation upon legislative power.[26]

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[22] Griggs v. County of Allegheny, 369 U.S. 84, 88-89 (1962).

[23] *Id.* at 89.

[24] *Id.* at 90.

[25] 55 Wash. 2d 400, 348 P.2d 664 (1960).

[26] *Id.*, 348 P.2d at 671; *see also* 26 AM. JUR. 2d *Eminent Domain* § 153 (1966).

> The government simply cannot arbitrarily declare that *all* of the airspace over a person's land is public domain and then, cavalierly, claim absolute immunity against property owner's claims for any and all possible damages.[27]

A reading of *Causby, Ackerman* and *Griggs* would indicate that the classification of airspace as "navigable" would not in itself bar that airspace from being the subject of a compensable taking for public use. Commentators are generally agreed that flights within the navigable airspace are privileged and therefore not subject to injunction, but the term "navigable airspace" should not be considered as defining or stating any rule of real property ownership.[28]

V. Application of *Causby*

Both *Causby* and *Griggs* were cases involving extremely low and frequent flights directly over the property of the owners who alleged a taking of an easement. The precise nature of the easement appeared to be one of flight over the property, thus the Court in holding an appropriation of the easement could be said to have viewed the overflights as continuing trespasses which gave rise to the landowner's action.[29] In so construing these cases, the Court of Appeals for the Tenth Circuit, in *Batten v. United States*,[30] limited the taking doctrine of *Causby* to those cases involving only direct overflights. In *Batten* the plaintiffs were the owners of ten residences adjoining Forbes Air Force Base in Kansas. These homes had been acquired prior to the Korean War during which time the base was enlarged to accommodate jet aircraft. The use of an enlarged runway was begun in 1955, and nearby ramps and "warm-up" areas were operated for the first time in 1956. Approximately 130 aircraft, of which 70% were RB-47 and B-47 six-engine jet bombers, used the base daily. The plaintiffs alleged no direct overflights by the planes from the base, but they showed that the nearby ramps and other areas were used by planes awaiting clearance to take-off, during which time their engines were idled. They also showed that repair and test activity on engines run at 50% to 100% of their capacity was carried out near the residences and that planes taking off became airborne at maximum engine capacity less than a half-mile from their property. The black smoke associated with these take-offs often blew onto the plaintiff's property, depositing an

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[27] Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664, 671 (1960).

[28] Note, *Noise Nuisance Which Creates Substantial Interference With Use and Enjoyment of Land Is a "Taking" of Property in the Constitutional Sense*, 41 Texas L. Rev. 827 (1963); Comment, *Air Law—The Federal Aviation Act of 1958*, 57 Mich. L. Rev. 1214 (1959).

[29] Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100, 104 (1962).

[30] 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

oily, black residue on the houses. When the engines were operated at full capacity on the base, the sound pressure level on the plaintiffs' property varied from 90 to 117 decibels. It was shown that the Air Force recommended ear plugs for its personnel at 85 decibels and required them when the sound level reached 95 decibels.

Even though these conditions were found to have decreased the value of the plaintiffs' houses, the court of appeals affirmed the holding of the trial court that, under *Causby,* there had been no taking. The court of appeals acknowledged that the plaintiffs had suffered damage but said that they had not been deprived of all or most of their interest.[31] *Causby* was viewed strictly as a taking of an easement of flight over property, resulting from repeated invasions of the landowner's column of airspace by direct overflights.[32]

The *Batten* decision was subject to severe criticism in various jurisdictions which viewed those flights which interfered with the use and enjoyment of land as giving rise to a taking even though they did not pass directly over the property.[33] The rationale of these decisions, in essence, was that the noise and vibrations from aircraft that cause substantial interference with the use of land amounted to a nuisance, and if allowed to continue would "ripen into a prescriptive easement to make the noise."[34] When maintained by an agency possessing the power of eminent domain, the continuing nuisance is an appropriation of an easement to impose a servitude of noise upon adjacent land.[35]

The Supreme Court of Oregon, in a decision[36] rendered shortly after *Batten,* criticized the reasoning of that decision, feeling that it ignored the law of servitude to limit a taking to only those cases involving a physical invasion of the superadjacent airspace.[37] The court said that in the context of cases dealing with aircraft noise, the foremost property right to be considered was the owner's ability to use and enjoy the property; when this ability is curtailed the owner has been deprived of a valuable property right for which he must be compensated.[38]

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[31] *Id.* at 585.

[32] *Id.*

[33] Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964); Henthorn v. Oklahoma City, 453 P.2d 1013 (Okla. 1969).

[34] Note, *Noise Nuisance Which Creates Substantial Interference With Use and Enjoyment of Land Is a "Taking" of Property in the Constitutional Sense,* 41 TEXAS L. REV. 827 (1963).

[35] *Id.*

[36] Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

[37] *Id.,* 376 P.2d at 104.

[38] *Id.,* 376 P.2d at 105.

The case of *Martin v. Port of Seattle*[39] was an inverse condemnation action by 196 property owners against the operator of the Seattle airport. In response to the argument that there could be no taking in the absence of direct overflights, the court, noting the vibrations from nearly lateral flights were so severe that it was necessary to re-hammer the nails in the sidings of the house every six months, said the gravamen of the plaintiffs' complaint was noise rather than any physical invasion.[40]

> This requirement, that a landowner show a direct overflight as a condition precedent to recovery of the damages to his land, is presently stressed by some federal courts. . . . We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land.[41]

The court could have allowed recovery under the provisions of the state constitution which provides for compensation to landowners when governmental activity takes or damages private property;[42] but it said it would not stress any proposed distinctions between taking and damaging of property rights as such

> subtle efforts at legal refinement to characterize and describe a particular interference can be expected to be more difficult and treacherous than convincing or utilitarian.[43]

VI. Mississippi Decisions

The decisions[44] in Mississippi involving alleged taking for public use by the operation of an airport have arisen out of the operation of the relatively new Jackson Municipal Airport, located east of Jackson in Rankin County.

In *Jackson Municipal Airport Authority v. Evans*,[45] it was held that zoning regulations adopted by the Joint Airport Zoning Board of Jackson and Rankin County under the authority of the Airport Zon-

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[39] 64 Wash. 2d 309, 391 P.2d 540 (1964).

[40] *Id.*, 391 P.2d at 545.

[41] *Id.*

[42] Wash. Const. art. 1, § 16, amend. IX.

[43] Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540, 543 (1964).

[44] Jackson Municipal Airport Auth. v. Wright, 232 So. 2d 709 (Miss. 1970); Jackson Municipal Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966).

[45] 191 So. 2d 126 (Miss. 1966).

ing Act,[46] while perhaps otherwise valid, constituted a taking or damaging of private property for public use without due compensation.[47] The Joint Airport Zoning Board, by the adoption of its zoning ordinance, had placed 80 acres owned by Evans in an "instrument approach zone" adjacent to the Jackson Municipal Airport. Under the regulations of this ordinance, the height of trees and structures on Evans' property was limited to 50 feet. When Evans permitted trees on his property to grow into the restricted zone, the Jackson Municipal Airport Authority filed a bill of complaint seeking a preliminary injunction to require Evans to "top off" or cut down those trees. The Hinds County Chancery Court sustained Evans' demurrer to the bill and dismissed the action, and the Supreme Court of Mississippi, after reviewing the *Causby* and *Griggs* decisions, affirmed the lower court. While recognizing that compensation is not due when a property owner is simply restricted in the use of his property by zoning regulations, the court said that the Airport Authority had interfered with and restricted the use of Evans' land under the zoning ordinance to such an extent that it constituted a "taking or damaging thereof for public use without due compensation being first made . . . ."[48]

The Mississippi Supreme Court in *Jackson Municipal Airport Authority v. Wright*,[49] an inverse condemnation suit, affirmed a lower court decision that the airport authority had appropriated an easement over Wright's property, in that it was necessary for planes using the airport to constantly pass at very low altitudes over his land. On the question of damages, however, the court held it was error to assess damages as of the time of trial rather than the time at which the taking for a public purpose had occurred. The airport had opened for regular use in July, 1963; Wright had filed suit in March, 1963; but the trial had not taken place until August, 1966. The court drew an analogy between inverse condemnation suits and conventional eminent domain proceedings, saying:

> [T]he rule . . . is firmly established in this state that compensation is to be calculated as of the date of taking, which is the date on which the application or petition is filed by the condemnor. We have concluded that constitutional compensation in cases of inverse condemnation likewise should be based on values and conditions as they were at the time of taking. Obviously, in such a case, the taking necessarily antedates the commencement of a suit by the owner, which must be based upon the premise that a taking already has occurred. The cause of

[46] MISS. CODE ANN. §§ 7544-01 to 7544-17 (1942).

[47] MISS. CONST. art. 3, § 17.

[48] Jackson Municipal Airport Auth. v. Evans, 191 So. 2d 126, 133 (Miss. 1966).

[49] 232 So. 2d 709 (Miss. 1970).

> action accrues when compensation becomes due, which is at the time of taking. The owner, of course, may sue immediately. The public agency having failed to bring eminent domain proceedings, it devolves upon him to determine the exact date on which his suit for compensation shall be filed. But a delay in the trial of the issues thereafter should not affect the amount justly due as compensation for the property or property right taken.[50]

The court felt that using the trial date three years after filing of the suit in computing the compensation actually due prior to the filing ignored certain changes affecting the value of the property, including fluctuations in the economy as a whole, changes in the type of neighborhood, and changes either in the property itself or the surrounding property.[51] The court, further justified determining the amount of the award by values at the time of taking rather than at the trial:

> (1) [I]t simplifies the problem of valuation because of its fixed rather than shifting date; (2) the condemnee, by failing to assert his right seasonably when the law gives him ample remedy, is not entitled to a different valuation in point of time; (3) the condemnor is not a common trespasser because of its right of eminent domain; (4) the measure of damages is the same whether or not condemnation proceedings were instituted prior to entry, namely, the value of the land without regard to benefits resulting from the improvement; and (5) the ascertainment of the value of the property at the time of the condemnation proceedings would, in case of depreciation of the property after the entry or appropriation work manifest injustice to the condemnee.[52]

The court said that for purposes of providing a definite date to be employed for computing compensation in inverse condemnation actions, the date of the filing of the suit by the landowner would be considered as the date of taking.[53] The measure of damages itself would be the same as in a conventional condemnation suit: the difference between the fair market value of the property immediately before and immediately after the taking.[54]

VII. Conclusion

Inverse condemnation suits have provided landowners a measure of relief from the inherent frustrations of living in the vicinity of today's

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[50] *Id.* at 714.

[51] *Id.*

[52] *Id., citing* Annot., 2 A.L.R.3d 1038, 1040-41 (1965).

[53] 232 So. 2d 709, 715 (Miss. 1970).

[54] Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 172 So. 2d 196 (1965).

sprawling airports. While receiving compensation for the appropriation of an easement, whether it is termed one of flight over land or of noise imposed upon the land, may not be completely satisfactory to a homeowner who either must continue to live under auditory harassment or attempt to sell out and uproot his family, it does aid in shifting some of the burden of living in the jet age from a relatively few citizens to the public that benefits from air transit. The jurisdictions which view the appropriated easement as one to impose upon neighboring land a servitude of noise seem to have developed the more logical vehicle for shifting the burden. Even in the majority of the cases which employ trespass terminology, it is actually the noise of the aircraft, rather than their mere physical passage over the land, that impairs the owner's ability to fully use his property. The trespass doctrine seems to be a blind effort to fit new wine into old legal bottles.

The most recent Mississippi decision, *Wright*, involved direct overflights; therefore, the Mississippi Supreme Court has not yet faced the question of whether lateral overflights can give rise to an action for a taking. Considering the weight the Mississippi court has afforded the decisions of the Washington and Oregon courts, and in light of our constitutional provision which requires compensation for both taking and damaging property for public use, it is submitted that Mississippi will not limit compensation to only those cases involving direct overflights.

Stephen O. Moore

STUDENT NOTES

D. W. BOUTWELL BUTANE CO. V. SMITH— EMPLOYEE EXONERATION WITH EMPLOYER LIABILITY—AN ANOMALY

I. *Introduction*

The brevity of the decision in *D. W. Boutwell Butane Co. v. Smith*,[1] handed down on February 8, 1971, is in stark contrast to its importance. While the holding that by application of the doctrine of respondeat superior the master may be liable to a third person even though the jury in the same action exonerated the servant from liability is not new to Mississippi law,[2] *Boutwell* is significant because it demonstrates the total acceptance by the Mississippi Supreme Court of a doctrine that "violates all logic, reason and common sense."[3]

In *Boutwell* a truck owned by the employer and operated by the employee was executing a left turn when it was struck by a car in which the plaintiff was a passenger. The company and employee were sued jointly, and though the jury exonerated the driver, a verdict was returned against the company.[4] One assignment of error on appeal was that since the company's liability depended upon the negligence of its employee, the company's motion for a judgment *non obstante verdicto* should have been granted after the jury exonerated its employee.[5] Affirming the decision of the trial court, the court stated:

> This question has been settled by Mississippi law for decades. Our Court, in a number of cases, has held that where the employee is exonerated and the master held liable, the case will not be reversed for that reason alone.[6]

After quoting a portion of § 1988, Mississippi Code Annotated (1956), the court cited two decision rendered at the turn of the century, *Illinois Central R.R. v. Clark*[7] and *St. Louis & S.F.R.R. v. Sanderson*,[8] and ruled:

> There are many other cases so holding, and since the legislature has permitted the statute [§ 1988] to remain as it was in the face of these decisions, we deem ourselves bound to follow the cases we have heretofore decided.[9]

The court's ruling that it was bound by stare decisis and legislative intent in *Boutwell* is not sound. Stare decisis has no application simply

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[1] 244 So. 2d 11 (Miss. 1971).

[2] *See generally* Recent Decisions, 26 Miss. L.J. 265 (1955).

[3] Gulf Refining Co. v. Myrick, 220 Miss. 429, 438, 71 So. 2d 217, 221 (1954).

[4] 244 So. 2d at 12.

[5] *Id.*

[6] *Id.*

[7] 85 Miss. 691, 38 So. 97 (1905).

[8] 99 Miss. 148, 54 So. 885 (1910).

[9] D. W. Boutwell Butane Co. v. Smith, 244 So. 2d at 12.

because *Clark* and *Sanderson*, to which the court looked for stare decisis, are not in point. Moreover, there is no clear legislative intent because the statute in question is procedural and should not be used to impair substantive law.

II. *Basis for an Employer's Liability*

When an accident which involves an employee and in which a third person is injured occurs, liability may be imposed against the employer under one of three theories: (1) independent negligence on the part of the employer, (2) strict liability and (3) the doctrine of respondeat superior. Under the first theory liability may be imposed upon the employer alone because defective machinery caused the accident[10] or because the master was negligent in hiring an unsafe employee or allowing an unsafe employee to continue working.[11] The employer in *Boutwell* was liable because of his independent negligence. There is nothing in the record on appeal to support liability upon this theory.

The second theory, strict liability, arises when an injury is caused by an inherently dangerous activity conducted by the employee for the employer. In such a case it is not necessary that the employee have been negligent for the employer to be held liable.[12] The employer in *Boutwell* was not held liable under a pronounced form of strict liability as such liability is not imposed in Mississippi upon motor carriers by statute, and the activity was not inherently dangerous. While strict liability may be imposed in Mississippi upon owners of dangerous instrumentalities, motor vehicles have been held not to fall in that class.[13]

The only recognized theory under which the employer in *Boutwell* could have been held liable was that of respondeat superior, a theory by which the negligence of the servant acting within the scope of his employment is imputed to the master, making the master liable solely because of a tort committed by his servant.[14] When the master and servant are sued jointly, a verdict for the servant but against the master is erroneous,[15] as such a verdict is in contravention of the very basis for

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[10] Sugg v. Hendrix, 153 F. 2d 240 (5th Cir. 1946); Burnett v. Avera, 203 So. 2d 788 (Miss. 1967).

[11] W. PROSSER, LAW OF TORTS § 70 (4th ed. 1971).

[12] RESTATEMENT (SECOND) OF AGENCY § 214 (1957); W. PROSSER, LAW OF TORTS §§ 78-79 (4th ed. 1971).

[13] Vicksburg Gas Co. v. Ferguson, 140 Miss. 543, 106 So. 258 (1925); Mitchell v. Eagle Motor Lines, 228 Miss. 214, 87 So. 2d 466 (1956). *Mitchell* cited *Ferguson* in holding that a tractor-trailer was not a dangerous instrumentality. *Id.* at 229, 87 So. 2d at 471.

[14] 77 C.J.S. *Respondeat Superior* at 317 (1952); RESTATEMENT (SECOND) OF AGENCY §§ 219, 243 (1957); W. PROSSER, LAW OF TORTS § 69 (4th ed. 1971); *see, e.g.*, Sugg v. Hendrix, 163 F.2d 240 (5th Cir. 1946); Woods v. Clements, 113 Miss. 720, 74 So. 422 (1917) and Todd v. Natchez-Eola Hotels Co., 171 Miss. 577, 157 So. 703 (1934).

[15] 57 C.J.S. *Master & Servant* § 619b (1948); 53 AM. JUR.2d *Master & Servant* § 406 (1970); RESTATEMENT (SECOND) OF AGENCY § 217B (1957).

respondeat superior. If the servant is exonerated, he is free of negligence, therefore there is no negligence to impute to the master.

According to this theory the liability of Boutwell Butane Company should have been abrogated a fortiori by the exoneration of the servant. Nothwithstanding this compelling logic, the company was held liable in *Boutwell* under what the court called "settled law."[16]

III. *Unsound Application of Stare Decisis and Legislative Intent*

A discriminating examination of the cases cited in *Boutwell* and other decisions utilizing the cited cases demonstrates that the law is not "settled," but that there are two conflicting lines of cases concerning respondeat superior vis-a-vis an exonerated employee. The line of cases upon which the court based stare decisis incorrectly applies *Clark* and *Sanderson,* and the line of cases which correctly interprets and applies respondeat superior was ignored by the court in *Boutwell.*

Illinois Central R.R. v. Clark,[17] cited with *Sanderson* in *Boutwell,* was the first case to utilize the holding reached in *Boutwell,* but careful analysis shows that the decision in *Clark* was reached through a different rationale. In *Clark,* the plaintiff was in his car when struck by a locomotive. He sued both the engineer of the train and the engineer's employer, the railroad company. Though the sole cause of the accident was the engineer's negligence, the jury acquitted the engineer but held the company liable.[18]

On appeal the trial court's decision was affirmed on three grounds: (1) strict liability, (2) the common law rule that contribution is not allowed between joint tort-feasors and (3) a statute that is now § 1988 of the Mississippi Code. Justice Truly, writing for the court, found that:

> Though equally liable *their liability was based on distinct and different legal principles*—the engineer, because of his personal trespass; the railroad company because of its failure to discharge its *nondelegatable* [*sic*] *duty* to the public regarding the custody and management of its dangerous instrumentalities.[19] (emphasis added).

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[16] 244 So. 2d at 12.

[17] 85 Miss. 691, 38 So. 97 (1905).

[18] *Id.* at 692, 38 So. at 97.

[19] *Id.* at 697, 38 So. at 98. The strict liability imposed by Justice Truly was more fully discussed by him in Barmore v. Vicksburg S. & P. Ry., 85 Miss. 426, 38 So. 210 (1905), rendered seven days after *Clark.* In *Barmore,* Justice Truly imposed the theory of strict liability upon owners of dangerous instrumentalities that is normally imposed upon owners of inherently dangerous activities. *Id.* at 450-51, 38 So. at 214-15. Dissenting, Chief Justice Whitfield urged that a distinction be made between instrumentalities dangerous only by their use and those inherently dangerous. As to the former he stated that "the liability of the master must depend exclusively upon the single question of whether the agent, in their use, has been negligent." *Id.* at 473, 38 So. at 223.

The strict liability imposed upon the company in *Clark* has no application to the liability imposed in *Boutwell* under respondeat superior.

The second reason for affirming the lower court decision in *Clark* was that the plaintiff could have sued either of the defendants or sued them jointly, and that even if both had been held liable, the company nevertheless would have been liable for the entire judgment.[20] This premise was correct at that time because the common law rule that no contribution was allowed between joint tort-feasors was in force in Mississippi, and the employer and employee in *Clark* were joint tort-feasors. However, the rule against contribution between joint tort-feasors was abrogated by the Mississippi legislature in 1952,[21] therefore the logic of the second reason for affirming is no longer correct.

Even if contribution between joint tort-feasors were still barred, it has no application to *Boutwell* because the employer and employee were not joint tort-feasors—the employer's liability in *Boutwell* was not separate, but imputed.

The third reason for affirming in *Clark* was the statute relied on in *Boutwell.* The statute reads in part:

> In all cases civil and criminal . . . . one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another not affecting his rights in the case . . . .[22]

The court reasoned:

> Because appellee by reason of the whim or sympathy of the jury was denied a recovery against both who were liable is no argument why he should be deprived of that which he did obtain. The question here involved, while new in the instance, is not new in principle.[23]

Though the procedural statute may have a proper use as to barring

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[20] 85 Miss. at 697, 38 So. at 98.

[21] MISS. CODE ANN. § 335.5 (1956); *see* Klaas v. Continental Southern Lines, Inc., 225 Miss. 94, 82 So. 2d 705 (1955).

[22] MISS. CODE ANN. § 1988 (1956). § 1988 was § 1440 for the 1880 code, § 4378 for the 1892 code, § 4944 for the 1906 code, § 3220 for HEMINGWAY'S 1917 CODE and § 3404 for the 1930 code. The section in the 1880 code underwent only minor changes in wording for the 1892 code and has remained unchanged since.

[23] Illinois Central R.R. v. Clark, 85 Miss. at 697-98, 38 So. at 98. In support the court cited two Mississippi cases, Knowles v. Summey, 52 Miss. 377 (1876) and Weis v. Aaron, 75 Miss. 138, 21 So. 763 (1897), dealing with application of the statute, and one Texas case. The Texas decision, Gulf, C. & S.F. Ry. v. James, 73 Tex. 12, 10 S.W. 744 (1889), while reaching a holding similar to *Clark*, dealt with a suit brought for malicious prosecution rather than negligence. The court ruled:

> In actions growing out of a class of torts characterized by the existence of a wrongful intent, *as distinguished from torts, arising from negligence*, the rule is recognized as just which compels each of the wrongdoers . . . to bear and assume the responsibility of all. Id. at 19, 10 S.W. at 746. (emphasis added).

one joint tort-feasor from receiving a reversal because of error as to another joint tort-feasor, as in *Clark*, it clearly has no application to a case such as *Boutwell*, in which the liability of an appellant has been imputed from one exonerated by the jury.

The second case cited in *Boutwell*, *St. Louis & S.F.R.R. v. Sanderson*,[24] was rendered in 1910 and specifically cited the statute relied on in *Clark* and *Boutwell*. The cause of action arose when a conductor shot a passenger[25] who had debarked the train without paying the fare. The jury found the shooting was not accidental as alleged by the conductor[26] and returned a verdict against the railroad company, but exonerated the conductor.[27]

The company asserted that liability could be imposed upon it only under respondeat superior, and it could not be liable under that theory as (1) the conductor was not acting within the scope of his employment, and (2) even if he were, his exoneration exonerated the company.[28] The court held that the question as to scope of employment had no effect upon the company's liability, for it was liable for a breach of its absolute duty to insure the safety of its passenger, imposed by its contract with its passenger.[29] Thus the company was held liable under either strict liability or independent negligence for not having a "competent conductor."[30]

The court then cited what is now § 1988 and held that it prevented reversal for the appellant because of error in the exoneration of the conductor.[31]

Thus *Clark* and *Sanderson*, the cases relied on by the Court to establish stare decisis in *Boutwell*, found the master liable on theories other than respondeat superior, the only recognized theory under which the master could be held liable in *Boutwell*.

The first case to incorrectly apply the *Clark* and *Sanderson* principle to a situation in which the employer's liability rested solely upon respondeat superior was *Thomas v. Rounds*.[32] In *Thomas* the plaintiff, after being struck by an ambulance, sued both the driver and the

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[24] 99 Miss. 148, 54 So. 885 (1910).

[25] The company asserted that the deceased was not a passenger as he did not pay the five cent fare and, therefore, that the company owed no duty to him. A friend of the deceased who was on the train with him testified that the conductor did not see them at the platform when they boarded and that though they did not offer to pay, they would have had the conductor asked for the fare during the one mile trip. The jury determined that the deceased was a passenger. *Id.* at 149, 158, 54 So. at 886-87.

[26] *Id.* at 149, 54 So. at 886.

[27] *Id.* at 149-50, 54 So. at 886-87.

[28] *Id.* at 159, 162, 54 So. at 888.

[29] *Id.* at 159-61, 54 So. at 888.

[30] *Id.* at 162, 54 So. at 889.

[31] *Id.* at 163-64, 54 So. at 889.

[32] 161 Miss. 713, 137 So. 894 (1931).

owner; judgment was entered only against the owner. Justice Griffith, before citing *Clark* and *Sanderson*, said:

> Tort-feasors are jointly and severally liable, and they are not entitled to contribution between themselves. Appellee therefore could have sued appellant, Thomas, alone, and for the same reason may, as they did, take judgment alone against him.[33]

Justice Griffith overlooked the key point in contention: a master should not be held liable through respondeat superior when the servant, whose negligence is imputed to the master, is exonerated.

The oversight in *Thomas* was apparently discovered by the court two years later in *McLaurin v. McLaurin Furniture Co.*[34] The case involved injury to the plaintiff wife caused by the negligent operation of the employer's automobile which was driven by his employee, the plaintiff's husband. After ruling that the employer could be held liable even though the husband was immune from tort liability, the court noted:

> Of course, in the character of case here under consideration, if the servant were not negligent, it logically follows that in such case the master could not be negligent. *The proposition demonstrates itself.*[35] (emphasis added).

The proper conclusion was again reached in *Granquist v. Crystal Springs Lumber Co.*[36] The plaintiff had been injured in an automobile accident. After obtaining a judgment against the employee in federal court, suit was filed against the employer. The trial court overruled the plaintiff's demurrer to the company's special plea that the second suit was barred by the prior judgment.[37]

Holding for the employer, Justice Griffith first pointed out that when the employer is liable solely under respondeat superior, the employer and employee are not joint tort-feasors.[38] Further, he discussed *Clark* and *Sanderson*, ruling:

> [I]t was held that the exoneration by the jury of the servant who was joined as a defendant in the action can not be availed of on appeal by the master; and it will be noted that *final refuge* for the maintenance of that view was taken in [§ 1988] —a *procedural section* . . . . [I]f some of the cases have inadvertently spoken of the liability to third persons of . . . master and servant, which is joint and several, as if making them joint tort-feasors, when the wrong was committed solely by the . . . servant and when the liability of the . . . master was a derivative of, or a dependency from, the tort of the . . .

[33] *Id.* at 718-19, 137 So. at 894.

[34] 166 Miss. 180, 146 So. 877 (1933).

[35] *Id.* at 190, 146 So. at 879.

[36] 190 Miss. 572, 1 So. 2d 216 (1941).

[37] *Id.* at 578-81, 1 So. 2d at 216-18.

[38] *Id.* at 581, 1 So. 2d at 218.

> servant and rests upon no other foundation, then . . . such cases, if they are to stand at all, must be henceforth construed within and as not going beyond the principles which we now affirm in the present case . . . .[39] (emphasis added).

The court returned to the erroneous logic of *Thomas v. Rounds* in a 1951 automobile collison case, *Rawlings v. Inglebritzen.*[40] Relying upon § 1988 and *Sanderson,* the court held that the employer could not obtain a reversal solely because a verdict was not returned against the codefendant employee driver.[41]

Rawlings was followed in 1954 by *Gulf Refining Co. v. Myrick.*[42] As in *Boutwell,* the codefendant driver was exonerated, but his employer held liable upon the theory of respondeat superior.[43] The supreme court, affirming, recited the facts in *Clark* and quoted all of that decision except the portion as to the separate liabilities of the servant and master—the *ratio decidendi* of the decision![44] The Court then gave the facts and holdings from *Sanderson* and *Rounds,* cited *Rawlings,* and stated that in view of those decisions, the appellant's contention had no merit.[45]

In a separate opinion Presiding Justice Roberds stated:

> I do not dissent in this case because the cases cited have held that the master may be liable for negligence of the servant even though the jury finds the servant is not negligent. However, it is opportune for me to say that *in my opinion such a conclusion violates all logic, reason and common sense.*[46] (emphasis added).

The final case on the point of law in question before *Boutwell* was *Canale v. Jones,*[47] which added further confusion to the already puzzling application of respondeat superior in Mississippi. Though the court properly applied respondeat superior in *Canale,* it based its holding on *Clark,* which concerned separate liability for joint tort-feasors, not respondeat superior.[48]

The illogical application of respondeat superior in *Boutwell* has been taking a winding, perplexing route since *Thomas v. Rounds,* with attempts at reason, as in *Granquist v. Crystal Springs Lumber Co.,* going unheeded. Basing the holding in *Boutwell* on *Clark* and *Sanderson* is an erroneous application of stare decisis, for those cases rested the

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[39] *Id.* at 584, 1 So. 2d at 219.

[40] 211 Miss. 760, 52 So. 2d 630 (1951).

[41] *Id.* at 766, 52 So. 2d at 632.

[42] 220 Miss. 429, 71 So. 2d 217 (1954); *see also* Recent Decisions, 26 Miss. L.J. 265 (1955).

[43] 220 Miss. at 433, 71 So. 2d at 218.

[44] *Id.* at 433-34, 71 So. 2d at 218-19.

[45] *Id.* at 434-35, 71 So. 2d at 219.

[46] Id. at 438, 71 So. 2d at 221.

[47] 228 Miss. 317, 87 So. 2d 694 (1956).

[48] *Id.* at 325-26, 87 So. 2d at 696.

employer's liability upon independent negligence or strict liability, not upon respondeat superior.

The second reason for affirming in *Boutwell* was the Legislature's seeming acceptance of decisions such as *Boutwell* by its failure to amend § 1988. Amendment, however, is not necessary; what is needed is a proper application of a procedural statute so that it is not used to impair substantive rights. A portion of the statute reads:

> [O]ne of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment . . . against another, *not affecting his rights in the case* . . . .[49] (emphasis added).

The employer's rights *are affected* as demonstrated *infra* when he is held liable under respondeat superior and the person whose negligence is imputed to him is exonerated. Thus the statute by its own terms should not be applied to deny reversal.

Referring to what is now § 1988, the court in *Weis v. Aaron*,[50] cited in *Clark*[51] and *Sanderson*,[52] held:

> When the action of the court below results in merely reversible error as to one of the parties, the other cannot assign here that error; *but when the action of the court below is absolutely void as to all, the statute does not apply.*[53]

It can be argued that a decision which exonerates the servant, but holds the master liable for the servant's negligence, should be held void, with, as demonstrated in *Weis*, the statute having no application.

The court should clarify application of § 1988 in the same manner as it clarified the use of a similar procedural statute, § 1881, Mississippi Code Annotated (1956), in *Mladinich v. Kohn*[54] and hold that § 1988 can not be utilized to override substantive rights.

IV. *Conclusion*

Should the court find it free of the mandates of stare decisis and legislative intent, the course open to it appears clear. A holding as in *Boutwell* is unjust to the plaintiff for (1) it deprives him of recovery against the primary wrongdoer,[55] (2) it may decrease his chances of

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[49] MISS. CODE ANN. § 1988 (1956).

[50] 75 Miss. 138, 21 So. 763 (1897).

[51] 85 Miss. at 698, 38 So. at 98.

[52] St. Louis & S.F.R.R. v. Sanderson, 99 Miss. at 163, 54 So. at 889.

[53] Weis v. Aaron, 75 Miss. at 141, 21 So. at 763-64.

[54] 250 Miss. 138, 164 So. 2d 785 (1964). The court ruled that § 1881 (a procedural statute concerning an appearance by a defendant to quash defective service of process as constituting a general appearance) would no longer be used for the purpose of ruling that a special appearance to contest jurisdiction constituted a general appearance and waiver of the issue of jurisdiction. *Id.* at 150, 164 So. 2d at 791.

[55] An employee may be joined solely to prevent diversity citizenship thereby preventing removal to a federal court. *See* RESTATEMENT (SECOND) OF AGENCY § 217B (1) comment *b* (1957).

obtaining a settlement prior to trial (in this regard such a holding is unjust to society also, as society must bear the burden of the litigation) and (3) it may decrease his chances of collection of a judgment.

A holding as in *Boutwell* is unjust to the employer, for it deprives him of his right to indemnity.[56]

A holding as in *Boutwell* causes the loss of whatever deterrance tort law furnishes against that person best able to prevent a similar accident —the negligent employee.

A holding as in *Boutwell* causes the loss of the incentive on the part of the employer to hire safe employees, for he realizes that he may be held liable under respondeat superior even though his negligent employee is exonerated, and that in effect the cost of the accident is being imposed upon him by the jury solely because he has the deepest pocket.

Through an erroneous application of respondeat superior as in *Boutwell*, the court is knowingly or unknowingly imposing an unpronounced form of strict liability upon the employer.[57] If done unknowingly, it is hoped that the court will see it is not bound by stare decisis and legislative intent and will apply respondeat superior in the proper manner. If, however, the court is knowingly imposing strict liability upon the employer, the wisdom of such an application is questionable, for public policy questions of this nature are best left to the legislature.

Rhesa H. Barksdale

JAVINS v. FIRST NAT'L REALTY CORP.— SHOULD WE FOLLOW THE LEADER

In 1966 litigation involving the re-evaluation of basic doctrine in the law of landlord and tenant was instigated in the Landlord and Tenant Branch of the Court of General Sessions in Washington, D. C. The final outcome of *Javins v. First National Realty Corporation*,[1] the topic of this note, could lend impetus to a broader reconsideration of the position to which a majority of jurisdictions currently adhere.

The appellants, tenants maintaining separate apartments in an apartment complex located in Washington, D. C., had entered into separate rental agreements with the landlord. After each tenant had failed to pay the rental due for the month of April, 1966, the landlord brought separate actions to recover possession of the premises. The

[56] An employer is entitled to indemnity from an employee when the employer is held liable for the employee's wrong. Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 582, 1 So. 2d 216, 218 (1941); 53 AM. JUR. 2d *Master and Servant* § 405 at 412 (1970). With a holding as in *Boutwell*, however, the master loses his right to indemnify, for the exoneration of the employee, under Mississippi law, is res judicata to the action for indemnity. Central Surety & Insurance Corp. v. Mississippi Export Ry., 91 F.2d 125 (5th Cir. 1937); *see* 42 C.J.S. *Indemnity* § 32 (1944).

[57] Recent Decisions, 26 MISS. L.J. 265, 267 (1955).

[1] 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied* . . . U.S. . . . (1970).

tenants attempted to raise and prove as an affirmative defense the existence of numerous conditions in the premises which arose after occupancy began and which constituted violations of the housing code.[2] The trial court concluded that the landlord was not bound by contractual duty to maintain the premises in compliance with the Housing Regulations throughout the term of the lease. This decision was affirmed by the District of Columbia Court of Appeals.[3]

However, the United States Court of Appeals for the District of Columbia reversed the decisions of the lower courts and found that any agreement, whether oral or written, purporting to let a residential dwelling located within the limits of the city of Washington, contains an implied warranty by the landlord that the premises will remain habitable throughout the term of the lease, the condition of habitability being measured by the standards outlined in the Housing Regulations.[4] The court also noted that a breach of this implied warranty establishes the basis for an action compensable through those remedies available for breach of any contract.[5]

In the absence of statutory provision the general rule is that a warranty of habitability will not be imposed by operation of law from an agreement which has as its purpose the letting of premises to be used as a residential dwelling.[6] Usually the tenant must either take the

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[2] DISTRICT OF COLUMBIA HOUSING REGULATIONS (1956).

[3] Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968).

[4] Section 2304 of the District of Columbia Housing Regulations provides:

> No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin.

Section 2501 of these same Regulations states:

> Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.

Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. Ct. App. 1968).

[5] Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

[6] However, under exceptional circumstances, several jurisdictions do permit a warranty of habitability to be successfully relied upon as a mode of obtaining either affirmative relief for its breach or as a means of defending against an action for possession of the premises by the landlord.

An exception to the general rule exists in several jurisdictions when the term of the lease is of short duration, and the lease is applicable to a dwelling which is furnished. The basis of the exception, as stated by one of the first American jurisdictions to adopt it, is that "[a]n important part of what the hirer pays for is the opportunity to enjoy (the premises) without the expense of preparing it for use," and that "it [would be] very difficult, and often impossible, for one to determine on inspection whether the house and its appointments (would be) fit for the use for which they [were] immediately wanted. . . ." Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). *See* 32 AM. JUR.2d, LANDLORD & TENANT § 770; 51C C.J.S. *Landlord & Tenant* § 305

premises in the condition in which they are found or gain through negotiation an express warranty that the premises will remain in a condition suitable for human habitation. Without such an express warranty, the landlord normally has no duty to the tenant with regard to the condition of the premises other than to disclose to him those defects known to the landlord which the tenant could not discover through a reasonably diligent inspection of the premises.[7]

The reasoning which supports this well established rule of law rests at least in part upon the maxim of *caveat emptor*. The law places upon the lessee the duty to inspect the premises before negotiations, leaving both parties, who then have equal knowledge of any patent defects in the premises, free to contract with respect to such defect. This concept was aptly and concisely expressed by the Supreme Court of Pennyslvania as early as 1872 when it stated with reference to an attempted implication of a covenant of quiet enjoyment that "[t]he lessee's eyes are his bargain."[8]

This rule also rests in part upon the ancient legal concept that any dwelling situated upon land is secondary in purpose to the land itself as a basis of a bargain of lease. Under this rationale, no warranty that buildings are fit for human habitation, even those specifically designed for that purpose, may be imposed by operation of law. Only when such warranty is explicity expressed by the landlord will it exist.[9]

Deciding *Javins v. First Nat'l Realty Co.*,[10] the court outlined three reasons upon which it based its rejection of the generally accepted standard: (1) a need to alter the common law so that it would reflect the change in economic and social conditions since the origination of the rule; (2) a desire to accord the tenant who "purchases" a residential dwelling for a fixed term the same level of protection that the law now affords other consumers; and (3) the need for change in the law generated by the effect of substandard housing upon the welfare of the sovereign and its people.[11]

Finding incumbent ". . . a duty to reappraise old doctrines in light of the facts and values of contemporary life . . ."[12] in order to maintain

(1968); Annot., 4 A.L.R. 1453 (1919); Annot., 29 A.L.R. 52 (1924); Annot., 34 A.L.R. 711 (1925).

Lessors have also been held to an implied covenant that premises will be suitable for the purposes for which they were leased when they are in an uncompleted state of construction at the time the agreement is consummated. I AMERICAN LAW OF PROPERTY § 3.45 (Casner ed. 1952).

[7] *See* 49 AM. JUR.2d *Landlord & Tenant* § 769 (1968); 51C C.J.S. *Landlord & Tenant* § 305; 2 R. POWELL, THE LAW OF REAL PROPERTY § 1225 (2) (Rohan ed. 1967); I AMERICAN LAW OF PROPERTY § 3.45 (Casner ed. 1952); Annot., 4 A.L.R. 1453 (1919); Annot., 13 A.L.R. 818 (1921); Annot., 29 A.L.R. 52 (1924); Annot., 34 A.L.R. 711 (1925).

[8] Moore v. Weber, 71 Pa. 429, 432, 10 Am. Rep. 708, 711 (1872).

[9] *See, e.g.*, Hart v. Windsor, 152 Eng. Rep. 1114 (Ex. 1843).

[10] 428 F.2d 1071 (D.C. Cir. 1970).

[11] *Id.* at 1077.

[12] *Id.* at 1074.

"the continued vitality of the common law . . ."[13] the court recognized as inapplicable to today's urban social structure "[t]he assumption of landlord-tenant law . . . that a lease primarily conveyed to the tenant an interest in land. . . ."[14] Instead, it found that ". . . in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live."[15] The court emphasized the basis of its decision by enumerating a partial list of alterations to the social structure which have occurred since the conception of the established rule. No longer are tenants able to make repairs with only slight inconvenience. Today's modern tenant is not the agrarian " 'jack-of-all-trades' farmer"[16] known to the common law, who found himself adequately equipped with tools and knowledge to perform almost any repair that presented itself.[17] The court aptly pointed out that because of the new mobility of the population, correlated with the growing difficulty encountered in attempting to repair, either because of the complexity of the dwelling unit or his inability to gain access to areas controlled by the landlord, the tenant is often no longer motivated nor in position to meet the obligation imposed on him by the common law.[18] Furthermore, the tenant of low or moderate means, lacking a long-term financial interest in the property, often encounters great difficulty if not probable impossibility in his search to obtain financing to make even minimal repairs.

The court was also compelled to its decision that the ". . . no-repair rule cannot coexist with the obligations imposed on . . . [a] landlord by a . . . modern housing code . . ."[19] through considerations present in the consumer protection cases. Relating to these considerations the court said:

> The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with 'the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.' *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 375, 161 A.2d 69, 78 (1960).[20]

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[13] Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 946 (D.C. Cir. 1960).

[14] Javins v. First Nat'l Realty Corp., 428 F.2d at 1074.

[15] *Id.*

[16] *Id.* at 1078.

[17] *See* J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE 6 (Tent. Draft 1969); I AMERICAN LAW OF PROPERTY § 3.78 (Casner ed. 1952).

[18] Javins v. First Nat'l Realty Corp., 428 F.2d at 1078.

[19] *Id.* at 1076-77.

[20] *Id.* at 1079.

Realistically appraising the rental housing market, the court determined that even when defects are obvious, the "[t]enant may have [had] no real alternative but to accept such housing with the expectation that the landlord [would] make necessary repairs."[21] This situation was considered to necessitate a rejection of *caveat emptor.*

Even beyond the rationale previously reiterated, the court suggested further justification for its holding by stating ". . . that the nature of today's urban housing market also dictates abandonment of the old rule."[22] Again emphasizing the inequality of bargaining power that exists between the landlord and the tenant due to the shortage of adequate housing, the court further pointed to specific ". . . impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases . . ."[23] which make the acquisition of housing of at least the minimum standard on favorable terms exceedingly difficult for certain groups. Finally the court's decision was guided by the recognition that the detrimental effects of poor housing are not limited to those persons suffering ". . . the daily indignity of living in a slum"[24] but tend to infest our entire society. As the Supreme Court of Wisconsin observed as early as 1961, "[p]ermitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners."[25]

By determining that lease agreements of residential dwellings should be governed by the same principles that govern other contracts,[26] the court further strengthened the bargaining position of the tenant. Traditionally, covenants between a landlord and tenant were viewed as being mutually independent of one another.[27] When covenants are considered mutually independent, a party against whom a breach has occurred has little recourse but to perform his obligation and bring an independent action for recovery based upon the breach.[28]

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[21] *Id.* n.42; *See also* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, U.S. DEP'T OF JUSTICE, & OFFICE OF ECONOMIC OPPORTUNITY, TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING 6 (1967).

[22] Javins v. First Nat'l Realty Corp., 428 F.2d at 1077.

[23] *Id.* at 1079; *See also* G. STERNLIEB, THE TENEMENT LANDLORD 71 (1966).

[24] Javins v. First Nat'l Realty Corp., 428 F.2d at 1080; *See generally* J. LEVI, *et al.*, *supra* note 15, at 7-8.

[25] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 413 (1961).

[26] Javins v. First Nat'l Realty Corp., 428 F.2d at 1075.

[27] *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 70 (1962); 11 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1292 (3d ed. 1968); 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1115 (1959 repl.).

[28] *See* I AMERICAN LAW OF PROPERTY § 3.11 (Casner ed. 1952); Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code,* 21 HASTINGS L.J. 369, 383 (1970).

Although covenants, when construed to be mutually independent of one another, vest no rights in either party to terminate performance upon the other party's breach, through superior bargaining power and by statutory authority, the landlord often obtains safguards for his interests. He may obtain an express covenant allowing him

However, by the adoption of contractual principles as the governing law, the obligations between a landlord and tenant are determined to be mutually dependent upon one another. When one's obligation to perform is considered dependent upon the performance of another, the moment a breach occurs the aggrieved party can curtail his own performance and abrogate the agreement.[29] Furthermore, by treating a lease like any other contract, all contractual remedies become available to the party against whom the breach has occurred.

It is obviously significant that ". . . the tenant's obligation to pay rent [is] dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. . . ."[30] Not only does the *Javins* decision reflect a departure from the rule of mutual independence, but it extends the departure into an area of landlord-tenant law into which it has rarely been extended before.[31] As one commentator has recently observed, "[t]he rule of dependency [has been], in most jurisdictions, unavailable to residential tenants. . . ."[32]

By construing the covenants to be mutually dependent, the court moved to make equal the relative bargaining positions occupied by each party after the lease has taken effect. Under such a holding, if a landlord fails to comply with either the express or implied covenants contained in the lease, the tenant is empowered to withhold his rental payment until compliance is forthcoming. Furthermore, the tenant can defend against an action for possession by introducing evidence of noncompliance into the proceedings. It further appears that an extended application of the decision would allow the tenant to defend against an action by the landlord for rent in arrears by showing a failure on the part of the landlord to provide the consideration for which he bargained—a dwelling that meets the prescribed standards.

The court augmented the balance of bargaining positions by determining, upon the authority of precedent construing industrial safety statutes,[33] that private agreements to alter, displace or waive the duties imposed by the Housing Regulations upon the lessor of residential property ". . . would be illegal and unenforceable."[34] Continuing to analogize, the court satisfied itself that to allow the parties to redeter-

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to terminate the tenancy upon the breach of an obligation by the tenant. *See generally* 38 MISS. L.J. 98, 126-27 (1966). The landlord's position is also often strengthened by statutes adopted in many states which abrogate the common law rule and allow eviction by the landlord for nonpayment of rent. See MISS. CODE ANN. § 900 (1956); MO. REV. STAT. § 535.20 (1949); GA. CODE ANN. §§ 61-301, 61-401 (1966); ALA. CODE tit. 31, § 6 (1958).

[29] *See* A. CORBIN, CONTRACTS §§ 633, 637 (1960); 3 THOMPSON, supra note 27.

[30] Javins v. First Nat'l Realty Corp., 428 F.2d at 1082.

[31] *See* Plevin, *Contract Principles and Leases of Realty*, 50 BOSTON U. L. REV. 24, 28 (1970).

[32] *Id.*

[33] Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 F. 298 (6th Cir. 1899).

[34] Javins v. First Nat'l Realty Corp., 428 F.2d n.58 at 1082.

mine by private agreement those duties imposed by the housing code upon the landlord ". . . would be to nullify the object of the statute."[35]

Finding persuasive a recent Illinois decision[36] which held the relevant portions of the Chicago building code to be incorporated into a contract for purchase, and upon its authority construing the applicable law of Washington, D. C., which existed at the inception of the lease as an express portion of the lease, the *Javins* court presented the tenant with a private remedy for violation and an effective tool for use in housing code enforcement.[37] Construing the contract to include duties imposed by law, the court concluded that it was ". . . not reading into the contract provisions different from those expressed and intended by the parties [into the agreement] . . ."[38] but instead ". . . [was] merely construing the contract in accordance with the intent of the parties."[39] Under this construction of the contract, every portion of the housing code must be considered as a basis of the bargain.

The court did not fail to recognize, however, that the particular parties then before it did not likely intend for the housing code to be construed as a portion of their agreement. But it found necessary the implication of the existing law as an element of the contract ". . . in order to meet [the] generally prevailing standards of honesty and fair dealing."[40] The housing code was said to express ". . . the expectations and intentions of most people."[41]

Although recent analysis[42] has summarized the practical effect of the decision as allowing a lessee of residential property to introduce into evidence violations of the housing regulations which have occurred after the term of the lease has commenced in defense of an action for possession for nonpayment of rent, the lasting effect must be greater. By its thorough analysis and complete documentation, the court appears to have interjected a solidifying force into the growing trend of replacing *caveat emptor* with doctrines that recognize modern approaches to current and future problems in landlord-tenant law. In a recent Wisconsin case[43] the pervading spirit of change was aroused when that court removed any misconceptions that might have been lingering concerning its regard for the old rule: "The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by the obnoxious legal cliché, *caveat emptor*."[44]

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[35] Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 F. 298, 302 (6th Cir. 1899).

[36] Schiro v. W. E. Gould & Co., 18 Ill. App. 2d 538, 165 N.E.2d 286 (1960).

[37] *See* TENANT'S RIGHTS, *supra* note 21 at 6-7.

[38] Schiro v. W. E. Gould & Co., 18 Ill. App. 2d 538, 544, 165 N.E.2d 286, 290 (1960) *as quoted in* Javins v. First Nat'l Realty Corp., 428 F.2d at 1081.

[39] *Id.*

[40] Javins v. First Nat'l Realty Corp., 428 F.2d n.56 at 1081.

[41] *Id.*

[42] Note, 39 CINCINNATI L. REV. 600 (1970).

[43] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[44] *Id.* at 590, 111 N.W.2d at 413.

The tenant in Mississippi finds himself virtually unprotected[45] by anything other than his own ability to observe and negotiate; state law strongly adheres to the doctrine of *caveat emptor.* The principle was first espoused in this jurisdiction in relation to a lease agreement in *Jones v. Millsaps.*[46] The Supreme Court held that a lessee must ". . . [take] the premises as he finds them . . ."[47] unless he is protected by an express warranty. A covenant, the effect of which would be to render the landlord responsible for the suitability of his premises for the purposes of the tenant, should not be implied in the agreement.[48] This principle has since been held applicable although the landlord has actual knowledge of the use to which the tenant intends to put the premises.[49]

The hesitancy of the court to infer from a lease a covenant to which the parties did not expressly agree springs from the generally accepted idea that to do so ". . . would amount to an essential modification 'by parol' of a written contract."[50] Moreover, the court has commented that the implication of a warranty of this nature ". . . [would confound] the passivity of the landlord with affirmative action . . ."[51] and "[overlook] the fundamental principle in all leases by which the lessor is made to 'hand off' during the continuance of the lease."[52] The freedom of the parties to negotiate between themselves in determining upon whom the obligation of maintenance should fall has been considered an effective method of achieving just results.

However, the rationale upon which the prevailing Mississippi rule was formulated has been modified, at least as it is applicable to residential dwellings, since its promulgation.[53] No longer do the majority of tenants, even in an economy which remains primarily agrarian in composition, consider the realty upon which their dwellings are situated the primary impetus for entering residential leases. Instead, many strive to attain ". . . adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance."[54]

Those public policies which have governed the previous imposition of warranty in other areas of law appear to be equally applicable to the landlord-tenant relationship as it exists in this jurisdiction. The landlord is initially better able to sustain the burden of the rising costs

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[45] Mississippi does adhere to one recognized limitation placed upon the doctrine in that a landlord is under a duty to disclose latent defects in the premises of which he is aware. Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1931).

[46] 71 Miss. 10, 14 So. 440 (1893).

[47] *Id.* at 18, 14 So. at 441.

[48] Jones v. Millsaps, 71 Miss. 10, 14 So. 440 (1893).

[49] Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 359 (1930).

[50] Jones v. Millsaps, 71 Miss. 10, 16, 14 So. 440, 441 (1893).

[51] *Id.* at 17, 14 So. at 441.

[52] *Id.*

[53] *See generally* note 15 *supra.*

[54] Javins v. First Nat'l Realty Corp., 428 F.2d at 1074.

of maintaining the premises in compliance with applicable law.[55] The cost of such maintenance will serve to either increase the landlord's cost of operation, lower the margin of profit or remove totally inadequate housing from the market.[56] Regardless of outcome, by employing this method of allocation the ultimate goal of the housing codes is satisfied in that decent housing will be provided to all tenants.

Although the prospective tenant has less knowledge of the premises than the landlord, and although he is less likely to know that which the landlord is required by law to provide in a leased dwelling, existing Mississippi legal authority places upon the tenant the entire risk of judging correctly the condition of the premises.[57] The adoption of an implied warranty of habitability applicable to housing let for residential purposes would redistribute the risk involved and reduce the emphasis currently placed upon the moment of inspection.

The Mississippi Supreme Court has yet to hear a controversy involving whether or not the covenants of a lease agreement should be construed as dependent upon one another. However, the fact that real property covenants are traditionally interpreted to be independent covenants,[58] and that opportunities in related areas[59] have been ignored by the court indicate that a decision could be rendered which would construe the covenants of the landlord to be independent from those of the tenant.

Should a contractual approach, as outlined in *Javins*, to construing residential lease covenants be adopted, however, the Mississippi landlord and tenant would be placed in positions of bargaining equality. With contractual principles governing, the construction of "[v]arious covenants in a contract [would] be deemed dependent unless the intention of the parties . . . gathered from the whole instrument . . . clearly . . . [made] it [*sic*] independent."[60] The contractual interpretation lends "[t]he presumption . . . that all stipulations in a contract are dependent."[61] Therefore, the landlord would not be precluded from contracting for covenants which were mutually exclusive in enforcement from the covenants governing the actions of the tenant. Instead, however, the landlord would possess the burden of showing clearly that the

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[55] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126-27 (1960); Plevin, *supra* note 31, at 37.

[56] *See* Prosser, *supra* note 54; Plevin, *supra* note 29, at 37.

[57] Jones v. Millsaps, 71 Miss. 10, 14 So. 440 (1893).

[58] *See* 51C C.J.S. *Landlord & Tenant* § 237 (1968); 49 AM. JUR.2d, *Landlord & Tenant* § 159 (1970).

[59] In two instances the court has held that the common law is to determine the construction and remedies available for failure of the tenant to pay rent unless a covenant is expressly included within the lease agreement which provides for forforfeiture and the right of reentry. Under the common law the landlord is not given the right to reenter the premises upon the tenant's failure to pay his rent. Monsanto Co. v. Cochran, 254 Miss. 399, 180 So. 2d 624 (1965); Clark v. Service Auto Co., 143 Miss. 602, 108 So. 704 (1926); Annot., 49 A.L.R. 511 (1927).

[60] Clark v. Till, 177 Miss. 891, 901-02, 172 So. 133, 135 (1937).

[61] *Id.* at 902, 172 So. at 135.

intent of both parties was to enter into covenants independent in nature and that the covenants into which they entered would not result in alteration, displacement or waiver of the duties imposed upon him by the housing code. Once these tests were met, the presumption of dependency imposed by the contract approach and the imposition of illegality assimilated from industrial safety precedent would disappear and the agreement would be governed in accordance with the express will of the parties.

The adoption of an implied warranty of habitability in Mississippi would not be without significant problems. There is no statewide housing code. The legislature has granted to municipalities discretionary power to adopt housing regulation,[62] but the legislature has failed to prescribe a minimum standard for such regulations.[63] Making applicable an implied warranty of habitability, in conjunction with the present lack of statewide housing regulations and lack of coordination in content of municipal housing codes, would effect a disunity of application based upon locality. Without the quick measure of the minimum standard of acceptability as displayed by a housing code, a determination of violation of an implied warranty would have to be obtained by other means. Uniformity of law, a vital public policy within itself, must necessarily be weighed against other policies in arriving at a rational answer to the question of whether all residential lease agreements in this state include an implied warranty of habitability.

Although the implementation of a *Javins* warranty would meet with disunity of application, the intent of the people inhabiting those municipalities which have adopted housing regulations has been expressed. An undivided effort should be undertaken by the courts of this jurisdiction to insure that that intent is fulfilled.

The foundations upon which the doctrine of *caveat emptor* has been justified have weakened, if not disappeared. The legal reformation which must be instigated, including action to allow private enforcement of housing regulations presently in effect, must come from the Mississippi Legislature. Progression of the law on the basis of case by case adjudication is too gradual for such a current problem, and it offers no assurance of substantial results. If the law which governs the landlord and tenant relationship in this state is to be ". . . a flexible and realistic tool for assuring justice in housing,"[64] then an implied warranty of habitability with uniform application across the state is vitally needed immediately.

Mike Chaffin

[62] MISS. CODE ANN. § 3374.80 (1956).

[63] *Id.*

[64] TENANTS' RIGHTS, *supra* note 21.

APPENDIX I

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P. O. Box 1032
William G. Burgin, Jr.
P. O. Box 32
Dudley H. Carter
P. O. Box 981
James Albert Dale, III
519-2nd Avenue North
Chester Davis Gaston
Route 5, P. O. Box 7
Gary L. Geelsin
P. O. Box 1366
Hunter M. Gholson
P. O. Box 32

James Tyson Graham
P. O. Box 166
Thomas Clower Harvey, Jr.
P. O. Box 602
Dewitt T. Hicks, Jr.
P. O. Box 32
John H. Holloman
P. O. Box 1102
W. Welborn Johnson
P. O. Box 1442
Willis H. Jolly, Jr.
P. O. Box 743
W. H. Jolly
P. O. Box 743
Billy J. Jordan
519 Second Avenue North
Jerome Lee Lohrmann
519 2nd Avenue North
Joseph R. Lipscomb
223 6th Street N
James C. Mauldin
Mauldin Furniture
Hal H. H. McClanahan III
207 5th Street North
Aubrey Eugene Nichols
P. O. Box 32
Ben L. Owen
P. O. Box 1001
Jacob C. Pongetti
126 5th Street North
Robert Brooks Prather
P. O. Box 32
J. O. Sams
514 2nd Avenue North
Joe O. Sams, Jr.
P. O. Box 249
George J. Schweizer
P. O. Box 1017
Taylor B. Smith
P. O. Box 1094
John F. S. Sims
P. O. Box 648
Douglas C. Stone
P. O. Box 166
Robert Clark Stovall, Jr.
711 6th Avenue North
W. J. Threadgill
P. O. Box 1094
Henry K. Van Every
P. O. Box 761
James A. Walters
519 North 2nd Avenue
Robin Weaver
P. O. Box 1003
David J. Whitaker, Jr.
P. O. Box 981

COMO

J. M. Stockton
Route 1, P. O. Box 57

CORINTH

W. C. Adams
Neal B. Biggers, Jr.
402 Franklin Street
Aubrey Horace Brewer
500½ Filmore Street
David Lee Coleman
P. O. Box 191
James P. Dean
P. O. Box 207
Donald Ray Downs
P. O. Box 191
Jimmy Blaine Fisher
P. O. Box 844
James L. Gullett
P. O. Box 668
John L. Hopkins
P. O. Box 801
H. A. Hopper
Chambers Liddon Bldg.
Robert G. Krohn
P. O. Box 549
James H. Mathis
402 Franklin Street
Joe B. Mitchell
509½ Waldron Street
James E. Price, Jr.
P. O. Box 549
John Curlee Ross, Jr.
P. O. Box 191
William L. Sharp
P. O. Box 844
Rodney F. Simmons
1217 Washington Street
Judge Orma R. Smith
U. S. District Court
Orma R. Smith, Jr.
P. O. Box 191
N. S. Sweat
P. O. Box 227
W. C. Sweat, Jr.
P. O. Box 128
Charles R. Wilbanks
P. O. Box 801
John Ronald Windsor
1504 Cruise Street
B. F. Worsham
P. O. Box 146
John Richard Young
P. O. Box 212

CRYSTAL SPRINGS

J. Harold Graham, Jr.
P. O. Box 287
James Warren Kitchens
201-A Glen Street
Merrimen M. Watkins
P. O. Box 233

DECATUR

James B. Everett
P. O. Box 51
Leo Horan
P. O. Box 367
William H. Johnson, Jr.
P. O. Box 55
Leon Mangum
P. O. Box 222

DEKALB

J. H. Daws
Helen J. McDade
P. O. Box 112

DODDSVILLE

Woods Eugene Eastland
P. O. Box 25

DREW

O. M. Marsalis
Thomas M. McWilliams
111 South Main Street
Pascol J. Townsend, Jr.
105 South Main Street

DURANT

Carl F. Drake
S. R. King
P. O. Box 91
James A. White
P. O. Box 283

ECRU

Glen H. Davidson

EDWARDS
Bobby Leon McHann
P. O. Box 96

ELLISVILLE
Mary L. Busch
P. O. Box 266
W. D. Carmichael
P. O. Box 250
Glender Dennis
P. O. Box 426
Cecil G. Johnson
P. O. Box 403
Billy Joe Landrum
P. O. Box 6

EUPORA
W. C. Butler
P. O. Box 86
Thomas E. Childs, Jr.
P. O. Box 450
William T. Denman, III
P. O. Drawer G
John Wesley Gary, III
P. O. Box 111
W. D. Gary
P. O. Box 577
W. Buchanan Meek
Edwin Arnold Snyder
P. O. Box 134

FAYETTE
Harry L. Corban
R. L. Corban, Jr.
Carroll J. McLaurin
Richard M. Truly, Jr.
P. O. Box 344
James M. Walker
P. O. Box 36

FLORENCE
Joseph Bruce Garretty
P. O. Box 102
Billie Juhan
P. O. Box 371
John Marshall Lusk, Jr.
Route 3, P. O. Box 57
James Elliott Williams
Route 1, P. O. Box 3588

FLORA
J. Frank Evans
P. O. Box 364

FOREST
Jerry Lee Bustin
P. O. Box 719, Hillboro St.
T. Marx Huff
P. O. Box 87
William A. Huff
P. O. Box 179
Dannye L. Hunter
P. O. Box 336
Osborn G. Idom
P. O. Box 336
James Walter Lee
P. O. Box 385
Roy Noble Lee
P. O. Box 370
Thomas Drayton Lee
P. O. Box 370
Tom Stewart Lee
P. O. Box 16
Howard B. McCrory, Jr.
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P. O. Box 147
O. B. Triplett, Jr.
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O. B. Triplett, III
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FULTON
T. Victor Bishop
P. O. Box 563
William Herman Camp
Euple Dozier
P. O. Box 284
Percy A. Martin
P. O. Box 491
Nell C. May
P. O. Box 538
Frank A. Russell
P. O. Box 525
Stacy B. Russell
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GLOSTER
Fred Alvin Anderson, III
P. O. Box 368
Walker J. Carney, Jr.
P. O. Box 99
J. T. Lowrey
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P. O. Box 271
Jesse Murray Akers
P. O. Drawer 99
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P. O. Box 689
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Fountain D. Dawson
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Lake Tindall Davision
& McGee
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Whittington Building

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H. Talbot Odom
P. O. Drawer 1218

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James M. Pierce
P. O. Box 915

Judge Charles Pollard
P. O. Box 393

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P. O. Box 263
J. Stanny Sanders
P. O. Box 725
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Richard L. Smith
P. O. Drawer 1139
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401 Mac Arthur
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James E. Upshaw
P. O. Box 671
Seth Wheatley, Jr.
P. O. Box 389
Charles Leroy Whitam
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W. M. Whittington, Jr.
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Jim McRae Criss
P. O. Drawer C
Floyd M. Davis, Jr.
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Public Square
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P. O. Box 901
John T. Keeton
P. O. Box 666
Lucille T. Latta
P. O. Box 922
William A. Lomax
861 Line
Mitchell M. Lundy
11 Evans Building
Judge Marshall Perry
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P. O. Box 99
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Lida B. Shaw
1176 South Mound Street
Samuel J. Waits
P. O. Box 204

GULFPORT

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Bidwell Adam
P. O. Drawer BB
Harry Roger Allen
P. O. Box 996
Judge Frank W. Alexander
P. O. Box 986
Wade Baine
P. O. Box 1834
Robert Barber, Jr.
P. O. Drawer DD
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Peter Hickman Barrett
806 Second Street
Thomas Davis Berry, Jr.
1319 24th Avenue
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102 Cleve Street
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Joel Blass
Suite 310
Gulf National Bank
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P. O. Box 100
Norman Breland
P. O. Box 1030
Rae Bryant
P. O. Box 10
Thomas Ware Burt
206-207 Security
Savings Building
Pete H. Carruba
P. O. Box 1826
Napoleon Lepoint
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P. O. Box 1686
Roger T. Clark
4003 B Washington Ave.
David Leroy Cobb
P. O. Box 996
Joseph Patrick Compretta
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Everett E. Cook
P. O. Drawer C
Bruce G. Cornell
3rd Floor Hewes Building
David Cottrell, Jr.
P. O. Drawer H
Billy M. Davis
5102 Quincy Avenue
Jimmy G. Dedeaux
406 Hewes Building
Harold Joseph Demetz
P. O. Box 1297
William F. Dukes
201 Security Savings Bldg.
Phil R. Dunnaway
P. O. Drawer C
James S. Eaton
P. O. Drawer H
Daniel Lewis Edwards
2301 14th Street
G. E. Estes, Jr.
P. O. Box 88
William Estopinal
Medical Building
Milton Ray Fairchild
1919 15th Street
Captain Mark T.
Finch USAF
1101 Beach
Margaret E. Fisher
609 Woodward Avenue
Jason H. Floyd
P. O. Box 1107
Jason H. Floyd, Jr.
P. O. Box 1107
Cary L. Fondren, Jr.
P. O. Box 141
E. J. Ford, Jr.
201 Hatten Building
Paul M. Franke, Jr.
P. O. Drawer 100
Edward Gaines
2209 14th Street
Charles R. Galloway
P. O. Drawer H
James Babington Galloway
P. O. Drawer H
Robert Charles Galloway
P. O. Drawer H

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P. O. Box 22

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P. D. Greaves
Suite 308 Gulf National Bank Building

Michael D. Haas
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Nicholas M. Hass
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1503 24th Avenue

John F. Hester
Bayou View Apartments Apt. 13-F

Harry P. Hewes
Abstract Building

Gaston H. Hewes
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Judge William G. Hewes
P. O. Box 454

Viola J. Hilbert
P. O. Box 4043

Forrest E. Holder
22 Poplar Circle

Boyce Holleman
P. O. Drawer 1030

Alben N. Hopkins
P. O. Box 1826

Raymond Hunter
P. O. Box 88

Clyde Hurlbert
P. O. Box 541

Robert E. Husband
Suite 302 Gulf South Building

John C. Johnson
303 Gulf South Building

Walter R. Johnson
211 Gulf South Building

Walter Rayford L. Jones
P. O. Drawer 1720

Oscar B. Ladner
206-207 Security Savings Building

Eaton A. Lang, Jr.
P. O. Drawer H

Larry Lee Lenior
P. O. Box 507

Edward M. Lindsey
P. O. Box 524

Henderson C. Lindsey
1707 James Avenue

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P. O. Box 1268

William E. Logan
309 Hatten Building

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P. O. Box 277

Ernest G. Martin, Jr.
P. O. Box 730

Jolly W. Matthews, III
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R. B. Meadows
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Robert H. Milner, Jr.
P. O. Box 579

Webb M. Mize
310 Gulf Nat'l Bk. Bldg.

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1214 24th Avenue

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P. O. Box 100

Stanford E. Morse, Jr.
P. O. Box 100

Sherman L. Muths, Jr.
P. O. Box 127

Albert Necaise
P. O. Box 1030

Paul M. Newton
2414 14th Street

H. G. O'Conor
4512 Jefferson Avenue

Edgar L. O'Neill, Jr.
2513 Palmer Drive

Owen T. Palmer, Jr.
P. O. Box 717

Robert D. Portwood
P. O. Drawer 760

George M. Quin
454 Champin Street

William M. Rainey
P. O. Drawer S

James Norman Randall, Jr.
P. O. Box 749

George Grover Rayborn, Jr.
c/o General Delivery

Brent A. Richardson
P. O. Box 4051

Donnie D. Riley
Suite 100, 2120 Building

Grover Roberts
P. O. Box 992

Thomas N. Roberts, Jr.
P. O. Drawer Y

George Rosetti, Jr.
P. O. Drawer Y

Scotty R. Rosetti
P. O. Box 1297

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James Sideris
P. O. Box 819

Donald O. Simmons
P. O. Box 1206

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Suite 206 Downtown Building

George R. Smith
P. O. Box 177

Lee R. Spence
Trust Dept. Hancock Bank

Herbert J. Stelly, Sr.
P. O. Drawer Y

Thomas L. Stennis, II
P. O. Box 10

William L. Stewart
P. O. Box 717

Ben H. Stone
P. O. Drawer H

Thomas B. Sumrall
Hatten Building

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P. O. Box 730

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Suite 308 Gulf Nat'l Bank Building

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P. O. Box 580

McRae Turner, Jr.
Mississippi Power Co.

Dr. Fred Haden Walker
400 Pass Road
Judge Harry G. Walker
P. O. Box 1529
Knox W. Walker
408 Hewes Building
Gerald M. Warren
P. O. Box 1506
Knox White
P. O. Drawer 100
Neil W. White, Jr.
412 Hewes Building
Marguerite L. Williams
1805 19th Avenue
Richard L. Yarbrough
P. O. Box 1138
Thomas D. Yarbrough
P. O. Box 1872
Ralph D. Young
P. O. Drawer Y

GUNTOWN

James W. Bingham
P. O. Box 25

HATTIESBURG

Lawrence D. Arrington
P. O. Box 1292
Robert E. Arrington
P. O. Box 22
Bruce C. Aultman
P. O. Box 750
Dorrance Aultman
P. O. Box 750
B. H. Baker
P. O. Box 801
Stone D. Barefield
121 West Front Street
J. C. Bell
P. O. Box 566
M. D. Brett
P. O. Box 189
Robert L. Calhoun
P. O. Box 1933
Lester Clark
302 First Federal Building
Judge Harold B. Cubley
P. O. Box 969
Edward J. Currie, Jr.
P. O. Box 2044
George Gibon Currie
P. O. Box 626
George C. Curry
P. O. Box 1709
T. W. Davis, Jr.
P. O. Box 529
James K. Dukes
P. O. Box 2055
S. Wayne Easterling
P. O. Box 870
Samuel E. Farris
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201 Carter Building
Reginald A. Gray, III
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John S. Grove
P. O. Box 1024
Wallace R. Gunn
P. O. Drawer 1729
Judge Stanton A. Hall
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William Haralson
P. O. Box 2054
F. C. Hathorn, Jr.
P. O. Box 865
Rowland W. Heidelberg, Jr.
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P. O. Box 2055
John Roane Howell
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Carroll H. Ingram
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Robert T. Jackson
P. O. Box 1288
Rex K. Jones
P. O. Box 125
William F. Jones
P. O. Box 95
Karl W. Kepper
702 West Pine Street
Marie P. Kepper
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Forrest M. Morris, Jr.
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La Fare Murphy
P. O. Box 2044
William V. Murry
204 Conner Building
Larry Norris
501 Carter Building
Mildred W. Norris
P. O. Box 1633
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P. O. Box 1386
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Jack Homer Pittman
Suite 407 Carter Building
James C. Pittman
Suite 407 Carter Building
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P. O. Box 750
William F. Porter
P. O. Box 750
Thomas J. Riley
P. O. Box 654
M. M. Roberts
P. O. Box 870
Shelby R. Rogers
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P. O. Box 1606
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R. M. Sullivan
112 East Front Street
Dan Gary Sutherland
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John T. Armstrong, Jr.
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E. R. Arrington
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Donald C. Cooley
P. O. Box 388
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W. S. Henley
P. O. Box 509
Harry O. Hoffman, Jr.
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Carroll Kemp
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Julius L. Lotterhos, Jr.
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Gerald Wilborn
Chatham, Jr.
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Ross Lee Franks
Boyce Lee Garner
17 Union Street
Harry Randoph Garner
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Jon Bartlett Love
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Cinclair May
17 Union Street
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Joel P. Walker
Edward Lee Whitten
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James E. Woods
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S. E. McGee

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N. Miss. Rural
Legal Services
Warren E. Cox
N. Miss. Rural
Legal Services
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L. Glenn Fant, Jr.
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Sidney L. Hurdle
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William G. Kemp
P. O. Box 266
John L. Kennedy
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4403 Manhassett Drive
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Derek Parker
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Richard Wayne Parker
300 Old Canton Road
Billy Wayne Patridge
206 Stewart Circle
Judge J. Neville Patterson
Associate Justice
Supreme Court
W. R. Patterson
626 Newland Street
Mary Libby Payne
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Thomas B. Payne
4801 N. State Street
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Edward J. Peters
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M. J. Peterson
P. O. Box 727
Ellen L. Pfister
P. O. Box 521
Rubel L. Phillips
P. O. Box 22628
James A. Phyfer
501 E. Pearl Street
W. W. Pierce
300 Shamrock Building
George B. Pickett, Jr.
1717 E. Northside Drive
Bob W. Pittman
P. O. Box 1849
John R. Poole
214 Plaza Building
Barry H. Powell
Suite 1242 Petroleum
Building
Gilbert Bailey Powell
P. O. Box 8153
Roy D. Powell
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Thomas W. Prewitt
P. O. Box 22567
John H. Price, Jr.
P. O. Drawer 1532
Murray Price
4226 Fairfax Avenue
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1158 Argor Vista
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1009 Meadow Brook Rd.
Robert A. Pritchard
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5416 Sedqwick Drive
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1316 Kimwood Drive
William C. Reed, Jr.
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Jimmie B. Reynolds, Jr.
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Tom Rhoden
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Donald K. Richards
1503 Wilhurst Street
Charles C. Richmond
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145 Catalin Circle
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Louis E. Ridgway, Jr.
P. O. Box 378
William B. Ridgway
P. O. Box 187
A. H. Ritter, Jr.
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Jack L. Ritter
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Erskine W. Wells
P. O. Box 131
W. Calvin Wells
P. O. Box 22489
W. Calvin Bill Wells, Jr.
P. O. Box 131
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P. O. Box 119
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John Harold White, Jr.
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D. Jene Whitecotton
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Yandell Wideman
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P. O. Box 673
Michael C. Wilkinson
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P. O. Box 2425
W. R. Willis
P. O. Box 1262
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W. Wayne Wood
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James Leon Young
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Bank Building
J. Will Young
930 Deposit Guaranty
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Robert James Young
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3344 Santa Rosa Street

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William D. Brooks
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David E. Crawley, Jr.
Crawley Building
George Lee Dorrill
William Reynolds Ford
Crawley Building
D. H. Glass
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John D. Guyton
105-07 S. Madison Street
Chatwin M. Jackson, Jr.
P. O. Box 27
John C. Love, Sr.
P. O. Box 527
John C. Love, Jr.
P. O. Box 527
Alton Massey
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Ray S. Mikell
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Clarence E. Morgan, Jr.
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G. J. Thornton
Morgan & Lindsay Bldg.
Harold W. Williams
517 Lucas Street
Claude Jackson Woodward
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Thomas Sharp
Hoke Stone

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Fledell Chain
48 Oakcrest Drive
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Elson K. Collins
P. O. Box 732
Edwin P. Connolly
P. O. Box 525
Henry S. Davis, Jr.
P. O. Box 1137
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Gardiner Center Offices
Carl Dexter Ford
Room 303 Wallace Bldg.
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Choctaw Station
Stewart J. Gilchrist
P. O. Box 106
Ernest W. Graves
P. O. Box 2008
Choctaw Station
Matthew Harper, Jr.
P. O. Box 726
James D. Hester
P. O. Box 713
Thomas J. Holifield
P. O. Box 726
W. Major Holifield
P. O. Box 901
John Leonard Jeffries
P. O. Box 844
Harry E. Koch
P. O. Box 2455
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P. O. Box 731
Apheus Holland McRae
P. O. Box 65
Harold W. Melvin
P. O. Box 142
Leonard B. Melvin, Sr.
Leonard B. Melvin, Jr.
P. O. Box 142
Judge Goode
Montgomery, Jr.
P. O. Drawer 5
Humphrey C. Moynihan
P. O. Box 222
William S. Mullins, III
P. O. Box 2008
Choctaw Station
William Harold Odom
P. O. Box 354
L. A. Pacific
P. O. Box 1860
Samuel V. Pack
P. O. Box 706
Charles W. Pickering
P. O. Box 713
L. Percy Quinn
P. O. Box 1085
Kalford C. Ratcliff
P. O. Box 706
Quitman Ross
P. O. Box 464
A. S. Scott, Sr.
P. O. Box 403
A. S. Scott, Jr.
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Philip E. Stevens
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James R. Sullivan, Sr.
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William B. Sullivan
P. O. Box 41
William W. Sumrall
P. O. Box 726
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Jon A. Swartzfager
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T. Horton Hillman
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Broad Street
Burrell O. McGee
209 Broad Street
William B. Waits
P. O. Box 128
John C. Webb
P. O. Drawer 392

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Pat M. Barrett
P. O. Box 149
Pat M. Barrett, Jr.
P. O. Box 149
John William Barrett
P. O. Box 149
J. R. Gilfoy
P. O. Drawer 30
William L. Jordan
P. O. Box 415
Calvin R. King
106 Carrollton Street
G. H. McMorrough
Marshall H. Smith
H. Edwin White
208 Court Square

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P. O. Box 268
Joseph D. Gordon, Jr.
P. O. Box 268
Kenneth Gordon
P. O. Box 373
F. W. Stratton
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123 Buena Vista Drive
James M. Maxwell
400 Gulfview Avenue
Ralph Woods Pringle
908 East Beach

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R. W. Boydstun, Jr.
P. O. Box 342
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Frank M. Deramus
P. O. Box 31
Charles D. Fair
P. O. Box 509
Terry M. Haimes
J. Hoy Hathorn
Masonic Building
James Cal Mayo
P. O. Box 509
Edward C. Prisock
Masonic Building
Neal Prisock
Masonic Building
Burris Olen Smith
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Gene Stringer
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108 S. Columbus Ave.
Henry C. Wood

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William Thames Bailey
P. O. Box 265
John Laverne Dale
P. O. Box 67
William S. Fine
c/o J. O. Moss
Cynthia June Horn
P. O. Box 328
H. M. Hunter
P. O. Box 134
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P. O. Box 45
Maurice L. Malone
P. O. Box 208
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P. O. Box 572
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P. O. Box 585
Williams S. Murphy
William Avery Wilkerson
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Robert S. Reeves
258 East Bay Street
William Benjamin Regan
225 East Bay Street
B. D. Statham
110 North Cherry Street
William F. Watkins
101 N. Cherry Street

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Ellen E. Goldman
231 Chestnut
Ney M. Gore, Jr.
337 First Street

T. N. Gore
T. N. Gore, Jr.
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Chancellor
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W. Wilson Hewitt
John Glenn
Hollingsworth, Jr.
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M. Bradley Lawrence
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Nolan M. McCoy
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Aleita M. Sullivan
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Robert D. Coit
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Suite 315 Citizens National Bank Bldg.

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Paul Mains Neville
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Judge William Deb Neville
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Harold Noe
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P. O. Box 607

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413 Greater Mississippi Life

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P. O. Box 927

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Margaret E. Rogers
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P. O. Box 5355

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P. O. Box 1389

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115 S. Pearl Street
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306 McLaurin
Robin O. Cotten
626 Park Drive
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Thomas Richard Mayfield
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Judge Merle F. Palmer
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P. O. Box 244
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Choctaw Legal Service
Clayton Lewis
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Clayton T. Lewis
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Key Building
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Boudie A. Jaggers
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District
Joseph E. Winston
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P. O. Box 706
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Cason Rankin
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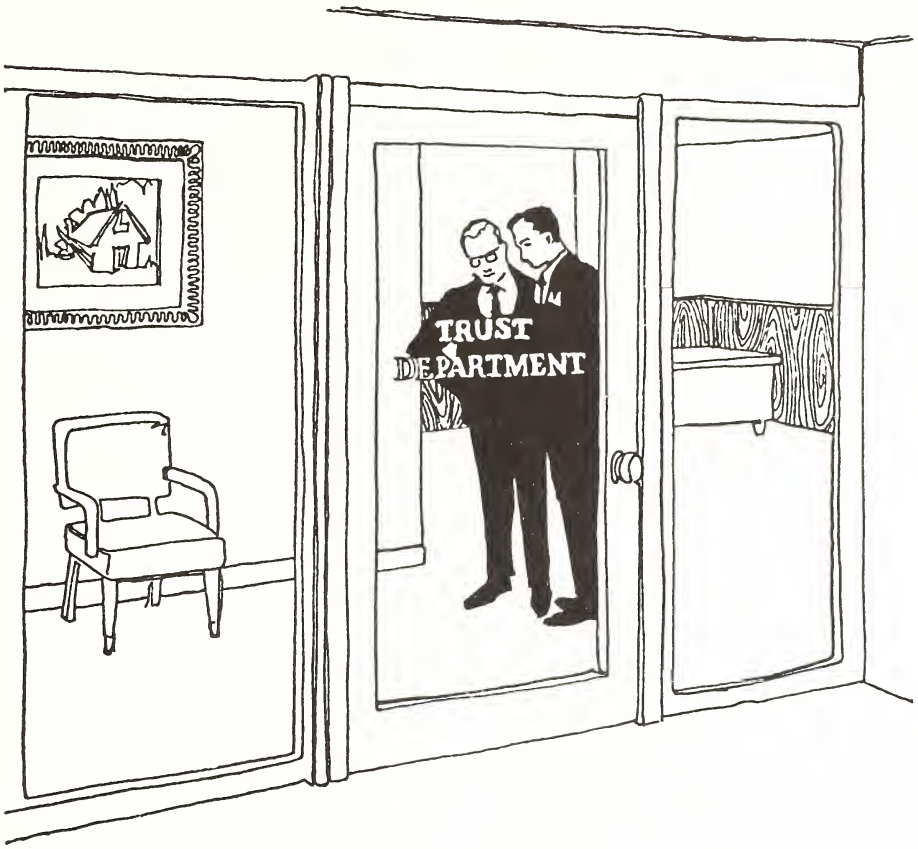

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